To: "Richard Windsor" [Windsor.Richard@epamail.epa.gov]; Diane Thompson" [Thompson.Diane@epamail.epa.gov]; Bob Sussman" [Sussman.Bob@epamail.epa.gov]; Steve Owens" [Owens.Steve@epamail.epa.gov]
From: CN=Arvin Ganesan/OU=DC/O=USEPA/C=US
Sent: Mon 9/14/2009 10:18:11 PM
Subject: Fw: TSCA memo
TSCA memo.doc

Apparently the last emails attachment didn't work. Try this, which should.

Sent from my Blackberry Wireless Device

From: Arvin Ganesan **Personal Privacy**
Sent: 09/14/2009 06:16 PM AST
To: Arvin Ganesan
Subject: TSCA memo

CONFIDENTIAL MEMORANDUM

TO: Rahm Emanuel
Jim Messina
Pete Rouse
Phil Schiliro
FROM: Lisa Jackson
DATE: September 9, 2009
SUBJECT: US Chemical Policy

Deliberative

Deliberative

Deliberative

Deliberative

The White House Task Force on Middle Class Working Families

Action: Middle Class Task Force will meet Wednesday, August 26. The focus of the meeting is expected to be planning for the next set of Middle Class Task Force meetings in the fall.

- The Vice President will make some brief opening remarks and then ask each participant for their specific suggestions on how the Task Force can do a better job of addressing the most pressing challenges facing middle class families. Each representative is expected to discuss one or two key ideas in the Task Force's core areas of concern – retirement security, child care and elder care, good jobs, pathways to the middle class, and healthy homes/communities. This could be a new or underdeveloped program, a way to improve an existing program, or an idea for new interagency collaboration to develop solutions to a difficult problem. The Middle Class Task Force will then select from among those recommendations one or two subject areas to serve as the focus of its fall meetings. We recommend that you discuss programs aimed at accelerating place-based, community-wide, inter-agency efforts at improving environmental conditions and providing economic opportunities, including (see attached summaries for additional details):
    - Smart Growth Partnership (healthy communities) – partnership among EPA, HUD and DOT designed to ensure that people of all income levels have access to housing near jobs and choices in transportation.
    - Programs that promote low-carbon communities (healthy communities and good jobs) – EPA's Climate Showcase Communities grants seek to create replicable models of sustainable community action, generate cost-effective greenhouse gas reductions, and improve the environmental, economic, public health, and social conditions in a community; EPA's Home Performance with ENERGY STAR, a national program from the U.S. EPA and U.S. DOE, offers a comprehensive, whole-house approach to improving energy efficiency and comfort at home, while helping to protect the environment.
    - Brownfields Program (healthy communities and good jobs) - promotes viable employment opportunities by funding job training grants that promote education and training for occupations in sustainable community planning, property assessment and cleanup, building design and construction, and renewable energy development.

- Nancy Sutley and Van Jones of CEQ will have 5-10 minutes to report on the CEQ Recovery Through Retrofit Initiative. If there is an opportunity, the Administrator may want to comment that:
    - EPA contributed ideas for the report that CEQ is drafting.
    - The final report has not been distributed, but EPA stands ready to include EPA's ongoing programs and emerging place-based initiatives in CEQ-led inter-agency projects.
    - Inter-agency cooperation can be an effective way to accelerate economic progress and environmental protection, since environmental protection does create jobs.

Background

White House Task Force on Middle Class Working Families

- The Middle Class Task Force includes: Vice President Biden, Chair; the Secretaries of Labor, Health and Human Services, Education, Treasury, Commerce, Housing and Urban Development, Transportation, and Agriculture; as well as the Directors of the National Economic Council, the Office of Management and Budget, the Domestic Policy Council, and the Chair of the Council of Economic Advisors
- Middle Class Task Force initiatives are targeted at raising the living standards of middle-class, working families in America. The Vice President and members of the task force intend to work with a wide array of federal agencies that have responsibility for key issues facing the middle class and expedite administrative reforms, propose Executive orders, and develop legislative and policy proposals that can be of special importance to working families.
- The Middle Class Task Force has held six monthly meetings so far:
    1. Green Jobs (Philadephia, 2/27/09)
    2. Recovery Act and the middle class (St. Cloud, MN, 3/11/09)
    3. Making College More Affordable for our Families (St. Louis, MO, 4/17/09)
    4. Building a Strong Middle Class Through a Green Economy (Denver, 5/26/09)

5. Promoting American Manufacturing in the 21st Century (Perrysburg, OH, 6/23/09)
6. Stable and Secure Health Care For Seniors (Alexandria, VA, 7/16/09)

CEQ: Recovery Through Retrofit

- At the May 26 Task Force meeting in Denver, the Vice President tasked CEQ to develop proposals that expand green job opportunities and boost energy savings for the middle class.
- CEQ convened an inter-agency task force including DOE, HUD, DOL, DOC, EPA, SBA, OMB as well as the Domestic Policy Council to focus, more narrowly, on residential energy retrofits
- After an initial deputy-level meeting on June 8, CEQ consolidated agencies' ideas into 5 workgroups:
    - Demand Creation, Financing, Workforce Development, Good Jobs and Equity, Innovation
    - EPA staffed workgroups from OAR, OPPT, OECA, OPEI, and convened a larger EPA workgroup to represent Agency interests
- CEQ is drafting a report that provides recommendations in the form of three action plans. The workgroups developed activities to support these three action plans.
    - Action Plan One: Demand and Finance
        - Action Plan One aims to simplify, standardize and the lower cost of home retrofits.
        - This includes various financing mechanisms, a labeling program and rating system, protocols for making home improvements, expansion of Home Performance with ENERGY STAR, and a national ENERGY STAR branding campaign.
        - Retrofits are characterized as energy efficient as well as *healthy homes* retrofits.
    - Action Plan Two: Workforce and Business Development
        - This includes developing training curriculum to meet certification standards, and supporting business development.
        - EPA programs that could contribute to curricula, training, and certification include: Home Performance with ENERGY STAR, the Lead Safe Program, Indoor Air Quality, Construction and Demolition programs).
    - Action Plan Three: Showcase Communities
        - This introduces concept of community-wide projects in specific places.
        - This includes aligning federal resources to support Showcase Communities that undertake community-wide efforts to "green" homes through retrofits, building upon local public/private relationships and federal agency partnerships, with strong participation by regional office of federal agencies. Possibility of wider scope.

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Administrator Lisa P. Jackson
Middle Class Task Force
August 26, 2009

Background: At this meeting, the VP is likely to direct a very general question to her like, "Tell us what the EPA is doing to help middle class families live in cleaner, healthier more energy efficient communities."

Don't Have to Choose

- President Obama has made clear that we don't have to choose between a strong economy and a green environment. He has said, instead, that the two are inextricably linked.

- For someone who has worked in environmental work for two decades, I can't stress enough how important that change is.

- So we are working to put actions behind those words.

Rebuilding Water Infrastructure

- Through the Recovery Act, EPA is putting billions into rebuilding water infrastructure. That's creating jobs and ensuring that families have clean, safe water to drink, swim in, and give to their children.

Site Cleanups

- We've been active in the cleanup of Brownfields and Superfund sites – places where pollution is having a negative impact on our communities.

- We were in Atlanta to award Recovery funds that will allow for numerous remediation projects around the Atlanta BeltLine, a string of developments driving their local economy.

- In Chicago, we are helping to train local residents for cleanup jobs, which not only puts a job in that community, it also opens new economic possibilities because the neighborhood is a better, healthier place to live, or invest in a business. Similar initiatives are taking place in other cities across the nation.

Expanding the Conversation to Create Pathways to the Middle Class

- One of our top priorities is to expand the conversation on environmental issues to reach under-represented people – tribal communities that are struggling with water quality, or inner city neighborhoods where pollution is a major health threat.

- By addressing those challenges, and making those neighborhoods better places to raise a family or set up a business, we are building pathways to the middle-class for entire communities that did not have them before.

Partnership for Sustainable Communities

- And finally, I'm very excited to be partnering with Secretaries LaHood and Donovan on our Partnership for Sustainable Communities.

- That will incorporate "livability" elements – like greenspace, walkable neighborhoods, and low-emissions, low-cost transportation options – into the decisions we make about growth.

- I was in Denver recently to help announce the Partnership, and we met at a Smart Growth community that had been putting these ideas into practice for years. Even during the economic downturn of the last few years, they had continued to thrive, adding new businesses to their community.

Part of the Solution

- We know that environmental quality plays a huge part in the prosperity of our communities. EPA is committed to being part of the solution, and to help create a vibrant middle-class that is at the heart of a sustainable economy.

Draft Response to July 17 Sensenbrenner Letter

1. **Was Dr. Carlin a member of a climate group within NCEE? Was he a member of any agency-wide climate groups?**

Deliberative

2. **Was Dr. Carlin forbidden to work on climate change issues? Was he removed from any working groups on the topic?**

Deliberative

3. **If Dr. Carlin was removed from climate issues and related working groups, who made the decision to remove him?**

Deliberative

Does EPA currently have any plans to reorganize NCEE? If so, what is the basis for the reorganization? When were such plans first discussed:

Deliberative

4. **What was EPA's timeline for its proposed endangerment finding? How long was NCEE given to review the TSD supporting the proposed finding?**

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Congress of the United States
Washington, DC 20515

July 17, 2009

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Jackson:

Evidence recently uncovered by our respective Committees raises serious questions about the integrity of the regulatory decision making process at the Environmental Protection Agency (EPA). In a recent interview with Committee staff, an EPA employee described a polarized culture at EPA. It was "a battle," he said, "between climate believers and climate skeptics."[1] Objective science was getting lost.

You previously wrote that "Public trust in the Agency demands that we...fully disclose the information that forms the bases for our decisions."[2] Because we believe your commitment to this ideal is sincere, we respectfully request your cooperation as we work to resolve whether EPA suppressed internal dissent by inappropriately limiting staff contributions and by punishing staffers who opposed EPA's decision to propose an affirmative endangerment finding.

Specifically, credible evidence suggests that EPA proceeded on a predetermined course to propose the endangerment finding and erected substantial hurdles to limit opposing viewpoints.

In our joint letter dated June 23, 2009,[3] we raised concerns about a series of emails, dated March 12-17, 2009, in which the director of EPA's National Center for Environmental Economics (NCEE) expressly refused to include a staff member's report in the official record. The staff member was Dr. Alan Carlin, a 37-year EPA employee. In the office director's view, the Administration was not interested in exploring questions of scientific uncertainty, as it had already "decided to move forward on endangerment" and Dr. Carlin's comments "[did] not help the legal or policy case for the decision."[4] In another email, and in a subsequent interview with Committee staff, the director indicated that, while the report held some important ideas, attempting to submit it for the record would have negatively impacted NCEE and undermined its role within EPA.[5] Given the

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[1] Telephone Interview with Dr. Alan Carlin, Senior Research Analyst, National Center for Environmental Economics, in Washington, D.C. (July 9, 2009) [hereinafter *Carlin Interview*].

[2] Memorandum from Administrator Jackson to EPA Employees (Jan 23, 2009) available at http://www.epa.gov/administrator/memotoemployees.html.

[3] Letter from Congressmen Sensenbrenner and Issa to EPA Administrator Jackson (June 23, 2009).

[4] Email from Office Director of EPA's NCEE to Senior Operations Research Analyst at NCEE (March 17, 2009).

[5] Telephone Interview with Dr. Al McGartland Director, National Center for Environmental Economics (July 1, 2009).

cultural battles that his staff described, the director's instinct to suppress the report may unfortunately have been warranted.

EPA attempted to dismiss these allegations by discrediting Dr. Carlin. An EPA spokeswoman stated that "certain opinions were expressed by an individual who is not a scientist and was not part of the working group dealing with the issue."[6] EPA's response, however, directly conflicts with evidence gathered by Committee staff.

Interviews with Drs. Alan Carlin and John Davidson revealed that Dr. Carlin actively participated in the internal agency workgroup tasked with the responsibility of drafting and evaluating the endangerment finding and the Technical Support Document (TSD).[7] It is our belief that his participation is adequately documented in emails sent between the organizers and members of the workgroup. Moreover, Dr. Carlin's important contributions on climate change were not in question previous to the suppression controversy, as both he and Dr. Davidson are listed as coauthors/ contributors of the TSD report.[8]

Perhaps more troubling than the suppression of the report, we have uncovered serious and credible allegations of retaliation against Drs. Carlin and Davidson. It is our understanding that Dr. Carlin is now prohibited from working on climate change issues and has been reassigned to tasks previously performed by junior staff members and contractors.[9] Specifically, Dr. Carlin has been removed from the climate change workgroup at NCEE, has been deleted from the group's email distribution list, is no longer invited to the group's periodic meetings, and has been forbidden from doing any work on the climate issues he had previously handled. According to sources, EPA took these actions in direct response to Dr. Carlin's submission of his report.

According to Dr. Davidson at NCEE, this action, while not unprecedented, deprived the center of a valuable resource on climate change. He said "Dr. Carlin had built up a wealth of knowledge and was a help as we attempted to grapple with the enormity of big picture climate science."[10]

Additionally, we have been informed that EPA is attempting to reorganize the NCEE in a manner that would result in the elimination of Dr. Davidson's position.[11] The

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[6] Ian Talley, *US Lawmakers Demand Probe Into Claims EPA Suppressed CO2 Study*, DOW JONES NEWSWIRE, (July 2, 2009).

[7] Carlin Interview, *supra* note1; Telephone Interview with Dr. John Davidson, Environmental Scientist, National Center for Environmental Economics, in Washington, D.C. (July 9, 2009) [hereinafter *Davidson interview*]

[8] Benjamin DeAngelo et al., Technical Support Document for Endangerment and Cause or Contribution Findings for Greenhouse Gases Under Section 202 (a) of the Clean Air Act, available at http://www.epa.gov/climatechange/endangerment/downloads/TSD_Endangerment.pdf.

[9] Carlin Interview, *supra* note 1.

[10] Davidson interview, *supra*, note 6.

[11] *Id.*

reorganization would potentially eliminate the scientific staff from the office—effectively disbanding the staff who argued that the science underlying EPA's endangerment record should be updated.

As you are aware, your agency is under a legal obligation to consider all relevant evidence when making a regulatory determination, not just the facts and opinions that are politically expedient.[12] Moreover, the perception of retaliation against career civil servants, whose only offenses are to raise legitimate questions during review of a regulatory decision, raises serious questions about political retribution. Given your many commitments to the American people to an open and transparent process at EPA, we are alarmed that such activities are occurring under your watch.

As a preliminary matter, we request your agency provide our Committees with the following documents:

1. The February 26, 2009 email and attached documents sent to EPA offices requesting expedited interim tiering for the Endangerment Finding. This email was distributed by Stuart Miles McClain.

2. The March 2, 2009 email and any attached documents announcing the first intra-agency workgroup meeting on the endangerment finding.

3. All documents relating to the March 3, 2009 work group meeting, including all records of attendance and briefing memorandum distributed to members of the workgroup.

4. The March 9, 2009 email and any attached documents sent by OAR staff to members of the workgroup. This email contained a draft of the endangerment finding and the TSD.

5. The March 10, 2009 email from Dr. McGartland to Drs. Davidson and Carlin regarding the role to be played by the NCEE in the review of the TSD.

6. The March 10, 2009 email, sent at 12:30pm from OAR to members of the workgroup regarding the leak of options selection material.

7. All documents relating to the March 11, 2009 workgroup meeting, including all records of attendance and briefing memoranda distributed to members of the workgroup.

[12] *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (stating the rulemaking record should include both "the evidence relied upon [by the agency] and the evidence discarded.")

8. All records related to the meeting scheduled for Thursday, March 12, 2009 between Alan Carlin, John Davidson, Ben DeAngelo, Rona Birnbaum, Stephen Newbold and others at the Agency.

9. The March 13, 2009 email to Paul Balserak and Al McGartland by NCEE staff with their response to the draft technical support document.

10. NCEE's submission to OAR, commenting on the Endangerment TSD.

11. All documents relating to Dr. Carlin's removal from the climate change work group at the NCEE and his subsequent reassignment to other projects.

12. All documents relating to the potential reorganization of NCEE.

As this is a limited and narrow document request, we appreciate a prompt reply. If you withhold any of the requested documents, please state the basis and legal justification for doing so. All documents should be turned over to our respective Committees no later than July 30, 2009.

In addition to these documents, we would appreciate your assistance in arranging interviews with the following staff at EPA: Chris Dockins and Steve Newbolt from NCEE as well as Ben De Angelo, Dina Kruger, Paul Balserak, and Rona Birnbaum. Because many of Dr. Carlin's statements related to our discussion with Dr. McGartland, we would appreciate the opportunity to briefly re-interview Dr. McGartland.

Finally, we request that you reply to the following questions before July 30:

1. Was Dr. Carlin a member of a climate group within NCEE? Was he a member of any agency-wide climate groups?

2. Was Dr. Carlin forbidden to work on climate change issues? Was he removed from any working groups on the topic?

3. If Dr. Carlin was removed from climate issues and related working groups, who made the decision to remove him?

4. Does EPA currently have any plans to reorganize NCEE? If so, what is the basis for the reorganization? When were such plans first discussed?

5. What was EPA's timeline for its proposed endangerment finding? How long was NCEE given to review the TSD supporting the proposed finding?

We sincerely appreciate your cooperation with this investigation. If you have any questions regarding this request, please contact Bart Forsyth, General Counsel, House Select Committee on Energy Independence and Global Warming at 202-225-0110 or Kristina Moore, Senior Counsel with the Oversight and Government Reform Committee at 202-225-5074.

Sincerely,

F. James Sensenbrenner, Jr.
Ranking Member
Select Committee on Energy Independence
and Global Warming

Darrell Issa
Ranking Member
Oversight and Government Reform Committee

cc: The Honorable Edolphus Towns, Chairman
The Honorable Ed Markey

MEMORANDUM

TO: Administrator Lisa Jackson

FROM: Bob Sussman
Senior Policy Counsel to the Administrator
Gina McCarthy
Assistant Administrator, Office of Air & Radiation
Larry Starfield
Acting Regional Administrator, Region 6

Re: Texas Air Permitting Action Plan

Date: August 26, 2009

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ATTACHMENT 1: TEXAS ROLL-OUT PLAN

CONFIDENTIAL
DELIBERATIVE PROCESS PRIVILEGE
DO NOT RELEASE

DRAFT: August 26, 2009

Texas Permitting SIPs – Strategy

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ATTACHMENT 3: ENVIRONMENTAL BENEFITS

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Appalachian Surface Coal Mining
Review of Proposal Subject to Enhanced Coordination Procedures

Issue: Deliberative

Deliberative

Status:

Deliberative

Recommendation: Deliberative

Deliberative

Summary of Analysis Supporting Recommendation: Deliberative

Deliberative

Effect of Recommendation: Deliberative

Deliberative

Message:

Deliberative

Deliberative

Background:

Deliberative

Appalachian Surface Coal Mining
Review of Proposals Subject to Enhanced Coordination Procedures

Issue: Deliberative

Deliberative

Recommendation: Deliberative

Deliberative

Summary of Analysis Supporting Recommendation: Deliberative

Deliberative

Effect of Recommendation: Deliberative

Deliberative

Message:

Deliberative

Background:

Deliberative

Deliberative

Status:

Deliberative

Draft Response to July 17 Sensenbrenner Letter

1. **Was Dr. Carlin a member of a climate group within NCEE? Was he a member of any agency-wide climate groups?**

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2. **Was Dr. Carlin forbidden to work on climate change issues? Was he removed from any working groups on the topic?**

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4. Does EPA currently have any plans to reorganize NCEE? If so, what is the basis for the reorganization? When were such plans first discussed?

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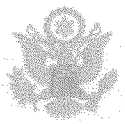
Deliberative

GEORGE VOINOVICH
OHIO



United States Senate
WASHINGTON, D. C. 20510

August 31, 2009

Administrator Lisa Jackson
USEPA Ariel Rios Building
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

Dear Administrator Jackson:

I was disappointed by your August 6, 2009, response to the request that Senator Inhofe and I made for a comprehensive economic and environmental impact analysis of the American Clean Energy and Security (ACES) Act of 2009. This is the second time the Environmental Protection Agency (EPA) has denied the Senate information related to EPA's modeling of ACES. Without this information, the Senate and our constituents will not have a complete picture of ACES—including its effect on the nation's energy infrastructure, consumers, small businesses, jobs, and the economy.

In your letter, you wrote that the Energy Information Administration's (EIA) recent economic analysis of ACES addresses all of the issues raised in our request, thereby making EPA's additional analysis unnecessary. Unfortunately, this is not the case. While I found EIA's analysis of ACES to be informative, EIA's modeling is lacking in a number of respects. For example, EIA's model only provides information through the year 2030, while EPA's model extends out to 2050. Because the effects of the legislation will compound over time, data for the 2030 to 2050 years are critical to having a complete understanding of how the bill will impact the economy. EPA can also provide us with information related to the impact ACES might have on global CO2 concentrations, including information on what might happen if other countries do not participate in emissions reductions schemes or conform to equitable, and consistent international commitments. EIA does not evaluate this type of data in its model, leaving EPA as the only government source that can provide information on whether the bill will have any impact on climate change.

We are interested in getting EPA's complete analysis before the debate over climate change legislation occurs in the Senate. Considering the sheer magnitude of this legislation, which will touch every part of the American economy, Senators should have thorough analyses from both EPA and EIA to facilitate a full, open, and transparent debate on cap-and-trade. Moreover, ACES has been placed on the Senate calendar, and major portions of the bill will likely be part of Senate climate change legislation. And, as the House vote on the bill attests, ACES is the House position on cap-and-trade legislation. If the need arises for a conference committee, Senators must have a complete understanding of the House position and its effect on jobs and the economy.

In its initial analysis, EPA concluded that ACES will cost Americans a mere "postage stamp a day" – an assertion that rests on assumptions that are widely recognized to defy political, practical, and technological realities. Such assertions call into question EPA's ability to produce analysis that is objective and reliable. You seemed to hint as much in your response letter, in which you referred us to EIA's analysis, because, as you wrote, "EIA operates independently of any political appointees and is recognized widely as an independent, rigorous economic modeling resource."

While I understand that passing an economy-wide, cap-and-trade program for greenhouse gasses is a major priority for the Obama Administration, that priority should not compromise EPA's ability to provide the U.S. Senate with a straightforward, comprehensive analysis of ACES. As the Senate considers this legislation or some variant of it, policymakers need analysis that covers the full range of effects from the bill—which includes using real-world assumptions about energy demand, energy supply, energy efficiency, and other issues critical to the bill's implementation and costs to economy. I understand that some speculation will occur and difficult assumptions will be made in predicting the impact of the bill, but every effort should be made to make it as objective as possible.

The seriousness of this issue demands a comprehensive, transparent analysis of the policy proposal now before us. I look forward to talking with you about this matter in the near future.

Sincerely,

George V. Voinovich

George V. Voinovich
United States Senator

Draft response to Barton

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Barton:

Thank you for your letter of July 16, 2009 requesting additional information and documents related to the U.S. Environmental Protection Agency's (EPA or Agency) proposed endangerment finding and technical support document (TSD).

Your letter asks a number of questions and requests supporting documents related to the timeline used for developing the draft TSD as well as the role that the National Center for Environmental Economics (NCEE) and its staff played in reviewing the proposed endangerment finding and the draft TSD. Many of your questions also focus on the comments of Dr. Alan Carlin, a member of NCEE. I appreciate your interest in this important issue and I agree with you that science and the law should be the forces that guide our work.

Dr. Carlin's views on climate science are included in the public docket of the Agency's proposed endangerment and cause or contribute findings for greenhouse gases on July 8th, 2009. I believe that high quality science should inform the ultimate decision on this proposal. EPA will fully consider Dr. Carlin's views, should the Agency finalize the proposal. As you know, EPA staff from across the Agency have been working for a number of years on evaluating the science that led to the proposed endangerment finding, which EPA published in the Federal Register in April 2009. EPA is working expeditiously to review the nearly 400,000 comments it received during the 60-day public comment period and two public meetings it held. Please be assured that EPA decision makers are open to a diversity of viewpoints from inside and outside the Agency. We are committed to use the best available science to evaluate these comments and finalize an endangerment finding.

Attached, please find detailed answers to your questions, as well as responsive documents. EPA has carefully reviewed each of the documents responsive to your request and understands the time sensitivity of your request. At this time, we are not releasing a number of documents that would ordinarily remain internal to EPA in these circumstances, due to their inclusion of detailed information regarding employee conduct and performance that cause privacy concerns. We are also not releasing a number of documents due to the ongoing deliberative process with respect to the proposed endangerment and cause or contribute findings.

Draft response to Barton

We are willing to re-visit and re-evaluate this body of documents upon completion of the deliberative process.

. Thank you again for your letter. If you have further questions, please contact me, or your staff may contact Arvin Ganesan in EPA's Office of Congressional and Intergovernmental Affairs at 202-564-4741.

Sincerely,

Lisa P. Jackson

Enclosures

1. **Was Dr. Alan Carlin's work commenting on the Technical Support Document (TSD) dated March 2009 prepared as part of his official EPA duties?**

Deliberative

2. **Was the set of comments prepared during March 2009 by Dr. Carlin concerning the March 2009 draft of the TSD forwarded to EPA staff outside the National Center of Environmental Economics (NCEE)? (a) If so, please identify by name and office all EPA staff who received the document and explain how EPA staff outside NCEE came into possession of a document his supervisor said he would not forward to the program office responsible for preparing the proposed endangerment finding? (b) Please provide all documents, including, but not limited to, emails, calendar records, and meeting notes, relating to (1) Dr. Carlin's written comments on the draft(s) of the TSD, (2) his expressed views about climate change, and (3) his analysis or comments about the EPA process for developing an endangerment proposal.**

Deliberative

3. **Why was Dr. Carlin directed not to work any longer on climate change on March 17, 2009? (See email, attached). Do you support this directive? If not, when was Dr. Carlin allowed to work on climate change again?**

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Deliberative

4. **Concerning the March 12, 2009, email from Dr. Al McGartland to Dr. Carlin and Dr. John Davidson: (1) explain the "tight schedule and the turn of events" and (2) explain why these two individuals were not to have "any direct communication with anyone outside of NCEE on endangerment," including "no meetings, emails, written statements, phone calls etc." (see attachment). (a) Were similar directives applied to others identified as authors and contributors to the TSD? If so, which person(s) originated these directives and when and how were they issued? (b) Have you, your staff, or EPA management restricted communication by any other career staff, particularly senior career professional staff, on the topic of climate change or any other science policy matter? If no, did this directive reflect your policies? Are you in agreement with this directive? (c) Please provide all documents, including, but**

not limited to, emails, calendar records, and meeting notes, relating to the decision to direct Dr. Carlin or Dr. Davidson not to communicate with anyone outside of NCEE on endangerment, including any directives or memoranda relating to your guidance on staff communication and/or on ensuring the scientific integrity and transparency at the EPA. (d) Have you had any concerns about unauthorized disclosures of information? Did those concerns ever involve NCEE?

Deliberative

5. **In your July 10, 2009, telephone conversation with Ranking Member Barton, you stated that Al McGartland was "counseled" about his actions or emails regarding Dr. Carlin. Please explain how and when he was counseled, who counseled him, what specifically he was counseled about, and who ultimately directed that he be counseled. What was the basis for the counseling? Did EPA conduct an internal investigation of Dr. McGartland's conduct? If so, what was the allegation, and what did EPA find?**

Deliberative

6. **Please identify and provide documentation for the specific events you referenced in your July 7 Senate testimony that formed the basis for your statements regarding Dr. Carlin's attendance at or participation in conferences, and identify which specific events occurred during prior administrations and which specific events, if any, occurred during the Obama administration. (a) Please provide records of travel requests since January 1, 2004 sought by and granted or not granted to Dr. Carlin for attendance at conferences or speaking engagements on the topic of climate change.**

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Deliberative

7. **Please provide the date(s) and list of attendees for each of the EPA brown bag lunches related to climate change science, policy, or economics, referred to in your July 7 Senate testimony, in which Dr. Carlin participated.**

Deliberative

8. **According to a June 29, 2009, press interview with Dr. Carlin by FOXnews.com, Dr. Carlin says his supervisor, Dr. Al McGartland, was pressured to take Dr. Carlin off of climate research when he attempted to submit his TSD comments. Please identify the person(s) who instructed Dr. McGartland to remove Dr. Carlin from climate research, and the basis for their instruction. If EPA does not have this information, please explain why and how Dr. McGartland could be counseled without all pertinent facts.**

Deliberative

9. **Please describe the purpose, role and functions of the Office of Policy, Economics, and Innovation (OPEI), including the NCEE, within your headquarters operation.**

Deliberative

10. **Please describe any ongoing efforts to evaluate the role of OPEI, the NCEE, or its other component offices and what your plans are for this office or any of its components, including plans for staffing increases (or decreases), for changes to staff expertise, for changes to its function or role within the Agency Action Development plan process or rulemaking process or other advisory or support function. (a) Please provide any evaluations of OPEI or its components you or your staff have requested to be conducted.**

Deliberative

11. **Please describe the EPA resources that have been and are planned to be devoted to the OPEI, including detailed budget information, broken out by center and function, the number of EPA employee positions (FTEs) assigned to work in these offices and their roles, the availability of contract funding support, performance goals, and measures for these specific office functions. Please provide this information for each of the years FY2008, FY2009 and FY2010.**

Deliberative

12. **Please describe the development of the TSD, including its initial development during the Bush Administration, and how the draft that circulated for review in March 2009 differed from the draft prepared in the Bush Administration? How was it updated?**

Deliberative

Deliberative

13. **Please identify the office and branch and individual(s) in charge of developing the draft TSD initially and the TSD draft that circulated in March of this year. Please also identify who in your office was responsible for advising you on and monitoring the draft TSD and its development.**

Deliberative

14. **Please explain why the EPA identifies Dr. Carlin as an EPA author and contributor to the April 17, 2009, TSD. What specifically was his contribution, when did he make that contribution, and what was the interaction between Dr. Carlin and EPA staff preparing the April TSD about his contribution, if any?**

Deliberative

15. **What was the schedule for EPA's internal review of the TSD prior to submitting the proposed endangerment finding to the Office of Management and Budget for review? (a) Who set the deadline for submission to OMB for review? (b) Did you or your staff attend or participate in any internal workgroup meetings or conference calls relating to the development of the TSD? If so, please identify who attended or participated, when, and why. (c) Please provide all documents relating to the schedule for preparation of the TSD, including but not limited documents reflecting the schedules and timetables for the drafting of the TSD and obtaining comments from EPA agency staff, calendars and attendance records for TSD workgroup meetings and conference calls, as well as all internal guidance and directives for preparing the TSD. (d) Why were offices, including the OPEI, outside of the Office of Air and Radiation given only about one week to comment on the TSD? (e) Please list the last 10 proposed rulemakings for which OPEI or its component offices were asked to comment, and identify how much time was provided to OPEI and NCEE for comment on each of these rulemakings.**

Deliberative

Deliberative

16. **Please explain the specific role and contributions of Stratus Consulting, the reported contractor that assisted EPA staff with preparation of the TSD. (a) Please provide all documents related to work performed by contractor(s) that assisted EPA staff in the preparation of the TSD issued in April 2009, including scoping documents, contracts, and drafts and comments, and any editorial contribution made by the contractor(s). (b) Please provide all documents related to the work to be performed by the contractor(s) that are and/or will be assisting EPA responding to comments on the proposed endangerment finding and/or TSD, including scoping documents and contracts.**

Deliberative

17. **Please explain the specific contributions of other EPA staff listed as "authors and contributors" to the TSD and explain how their contributions and evaluations were documented.**

Deliberative

18. **Please explain (1) the process for choosing, (2) the specific role, and (3) contributions and date of contributions of the Federal expert reviewers listed in the**

April 17, 2009 TSD. (a) Please provide all comments and contributions by these reviewers, and related responses from EPA staff members.

Deliberative

19. **During the July 10 telephone call with Ranking Member Barton, you participated in the call via a speaker phone. If others were in your office during this call, please list their names and affiliations and provide any notes taken of the phone conversation and when you muted the phone.**

Deliberative

20. **If the EPA withholds any documents or information in response to this letter, please provide a Vaughn Index or log of the withheld items. The index should list the applicable question number, a description of the withheld item (including the date of the item), the nature of the privilege or legal basis for the withholding, and a legal citation for the withholding claim.**

Deliberative

Attachment 1: Alan Carlin email on seminar series

Alan Carlin/DC/USEPA/US
10/08/2008 03:26 PM

To Neil Stiber/DC/USEPA/US@EPA
cc Al McGartland, Chris Dockins/DC/USEPA/US@EPA, Ann Wolverton/DC/USEPA/US@EPA, Carl Pasurka/DC/USEPA/US@EPA, Brett Snyder, John Davidson/DC/USEPA/US@EPA
Subject Write-ups for the next few climate science seminars

We have now assembled a list showing dates, rooms, titles, and abstracts for the following upcoming speakers in the climate science seminar series and plan to add these to our NCEE website about noon on Tuesday, October 14. You may also wish to do so on your Web pages. Please advise if you have any comments/corrections. We could not add any biographical information on Dr. Ebi for lack of information, but would be happy to do so. All of the abstracts for those arranged here in NCEE have been written by the speakers themselves:

October 16, 2008 (1-2:30 pm), Room 4144, EPA West
Global Sea Level Rise

Carl Wunsch (MIT)

Abstract:
Like many aspects of climate change, the problem of determining, describing, and understanding shifts in "sea level" proves to be far more complicated and interesting than summary sound bites suggest. Something is now known of the spatial patterns of sea level change and they are very complex, showing major regions of falling sea surface over large areas. Although the best estimates of the global average all show a positive rate of rise, partitioning the rise between heating/cooling and the addition/subtraction of fresh water lies at the very edge of modern oceanographic observational and modeling techniques. The eventual societal costs of sea level rise, whether accelerated or stable at present estimated rates, are huge and to a large extent appear inexorable.

Prof. Wunsch is the Cecil and Ida Green Professor of Physical Oceanography at MIT. He is a member of the National Academy of Sciences and has authored or co-authored about 225 scientific papers and four books

November 18, 2008 (2:00 pm), 4th Floor Conference Room, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, DC
Human Health Impacts of and Public Health Responses to Climate Change

Kristie L. Ebi (independent consultant with ESS, LLC)
EPA Contact for this seminar: Neil Stiber, phone: 202-564-1573, E-mail: stiber.neil@epa.gov

Abstract:
Climate change is projected to have far-reaching effects on human health and well-being. Heatwaves and other extreme weather events (e.g., floods, droughts, and windstorms) directly affect millions of people and cause billions of dollars of damage annually. There is a growing consensus that the frequency and intensity of extreme weather events will likely increase over coming decades as a

consequence of climate change, suggesting that the associated health impacts also could increase. Indirectly, climate can affect health through affecting the number of people at risk of malnutrition, as well as through alterations in the geographic range and intensity of transmission of vectorborne, zoonotic, and food- and waterborne diseases, and changes in the prevalence of diseases associated with air pollutants and aeroallergens. Climate change has begun to alter natural systems, increasing the incidence and geographic range of some vectorborne and zoonotic diseases. Additional climate change is projected to significantly increase the number of people at risk of major causes of ill health, particularly malnutrition, diarrheal diseases, malaria, and other vectorborne diseases. Climate also can impact population health through climate-induced economic dislocation and environmental decline.

Public health has experience in coping with climate-sensitive health outcomes; the present state of public health reflects (among many other factors) the success or otherwise of the policies and measures designed to reduce climate-related risks. Climate change will make more difficult the control of a wide range of climate-sensitive health outcomes. Therefore, policies need to explicitly consider these risks in order to maintain current levels of control. In most cases, the primary response will be to enhance current health risk management activities. Although there are uncertainties about future climate change, failure to invest in adaptation may leave communities and nations poorly prepared, thus increasing the probability of severe adverse consequences. Equally, mitigation strategies, policies, and measures are needed to rapidly reduce emissions of greenhouse gases, to improve health today and to prevent health impacts in future decades. Policy makers need to understand the potential impacts of climate change, the effectiveness of current adaptation and mitigation policies, and the range of choices available for enhancement of current or development of new policies and measures.

December 9, 2008, Room 1117A, EPA East
Global Warming: What Is It All About?
Richard Lindzen (MIT)

While Global Warming is frequently presented as a single phenomenon that one either believes in or denies, the real situation is, unsurprisingly, much more complex. There are, in fact, certain aspects of the issue on which a substantial measure of agreement exists: namely, that global mean temperature has increased a few tenths of a degree since the 19th Century, and that increases in atmospheric CO2 have contributed some part of this warming. We will examine some approaches to determining exactly how much of observed warming is actually due to anthropogenic greenhouse forcing, and how explicit feedbacks are involved in these results. However, the connection of this warming to catastrophic projections is extremely tenuous. Moreover, proposed mitigation policies have little relevance to warming regardless of the level of warming expected. Understanding these 'disconnects' not only helps one to assess the overall situation rationally, but also permits one to see how the issue is being improperly exploited.

Dr. Lindzen is the Alfred P. Sloan Professor of Meteorology at MIT. He is a member of the National Academy of Sciences and has authored or co-authored over 200 professional journal articles.

January 28, 2009, Room 4144, EPA West
How Natural and Anthropogenic Influences Alter Global and Regional Surface Temperatures: 1889 to 2006
Judith Lean (U.S. Naval Research Laboratory)

Abstract:

To distinguish between simultaneous natural and anthropogenic impacts on surface temperature, regionally as well as globally, we perform a robust multivariate analysis using the best available estimates of each together with the observed surface temperature record from 1889 to 2006. The results enable us to compare, for the first time from observations, the geographical distributions of responses to individual influences consistent with their global impacts. We find a response to solar forcing quite different from that reported in several papers published recently in this journal, and zonally averaged responses to both natural and anthropogenic forcings that differ distinctly from those indicated by the IPCC, whose conclusions depended on model simulations. Anthropogenic warming estimated directly from the historical observations is more pronounced between 45° S and 50° N than at higher latitudes whereas the model-simulated trends have minimum values in the tropics and increase steadily from 30 to 70° N.

Dr. Lean is a Senior Scientist for Sun-Earth System Research in the Space Science Division of NRL. She is a member of the National Academy of Sciences and the author or co-author of over 100 papers in professional journals.

February ??, 2009, TBA

Climate Change and Its causes: A Discussion about Some Key Issues

Nicola Scafetta (Duke University)

Abstract:
A comparison of past and recent studies suggests that the problem of climate change is complex, as it is evident. Several key issues remain open and their solution may drastically change our understanding of the phenomenon. The crucial issue is: how is it possible to address a problem such a climate change where several crucial physical ingredients are still severely uncertain? In particular, some of the key issues he will address are: a) Did the total solar activity remain constant (as the IPCC and PMOD claim) or increase (as ACRIM claims) since 1980? b) Was the preindustrial temperature almost constant (The Hockey Stick graph) or did it experience a large change? c) What is the contribution of the GHG forcing on climate change, was it overestimated in some important past publications and might this have contributed to shape and bias the following debate? It is evident that solving the above issues in one way or in another is crucial for correctly interpreting climate change. He will propose a solution based on minimal physical assumptions that appear to have been confirmed by a large scientific empirical and theoretical literature. This solution suggests that a significant portion of climate change is natural and linked to changes of solar activity. He will also address the puzzling possibility that climate change might be partially driven by an additional natural forcing different from the radiative one that has not been identified yet. Finally, he will use these findings to attempt a climate prediction about the 21st century and discuss the possibility of an imminent global cooling.

Dr. Scafetta is a research scientist in the Department of Physics at Duke. He has about 40 papers in peer reviewed journals and two books in preparation.

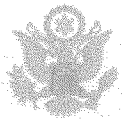
Alan Carlin
566-2250

Attachment 2: OPEI Budget - FY 2008Through FY 2010

Program Project		FY 08 Enacted	FY 09 Enacted	FY 10 President's Budget
Brownfields (Funds a portion of Office of Cross Media Programs)	PC&B	$694.0	$725.0	$760.0
	Extramural	$507.0	$478.0	$486.0
	Sub Total	**$1,201.0**	**$1,203.0**	**$1,246.0**
Regulatory Innovation (Funds a portion of Office of Cross Media Programs and all of National Center for Environmental Innovation)	PC&B	$10,368.0	$11,126.0	$11,657.0
	Extramural	$7,677.0	$5,091.0	$6,622.0
	Sub Total	**$18,045.0**	**$16,217.0**	**$18,279.0**
Small Business (Funds a portion of Office of Cross Media Programs)	PC&B	$680.0	$718.0	$756.0
	Extramural	$527.0	$537.0	$545.0
	Sub Total	**$1,207.0**	**$1,255.0**	**$1,301.0**
Regulatory/Economic-Management and Analysis (Funds Office of Regulatory Policy and Management, Immediate Office, Administrative Support and Innovation Staff and the National Center for Environmental Economics)	PC&B	$13,797.0	$14,611.0	$15,272.0
	Extramural	$2,486.0	$2,118.0	$7,056.0
	Sub Total	**$16,283.0**	**$16,729.0**	**$22,328.0**
OPEI Sub Total		$36,736.0	$35,404.0	$43,154.0
Regional PC&B (in Reg Innovation)		$3,377.0	$3,592.0	$2,250.0
OPEI Grand Total		***$40,113.0***	***$38,996.0***	***$45,404.0***

Deliberative

GEORGE VOINOVICH
OHIO



United States Senate
WASHINGTON, D. C. 20510

August 31, 2009

Administrator Lisa Jackson
USEPA Ariel Rios Building
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

Dear Administrator Jackson:

I was disappointed by your August 6, 2009, response to the request that Senator Inhofe and I made for a comprehensive economic and environmental impact analysis of the American Clean Energy and Security (ACES) Act of 2009. This is the second time the Environmental Protection Agency (EPA) has denied the Senate information related to EPA's modeling of ACES. Without this information, the Senate and our constituents will not have a complete picture of ACES—including its effect on the nation's energy infrastructure, consumers, small businesses, jobs, and the economy.

In your letter, you wrote that the Energy Information Administration's (EIA) recent economic analysis of ACES addresses all of the issues raised in our request, thereby making EPA's additional analysis unnecessary. Unfortunately, this is not the case. While I found EIA's analysis of ACES to be informative, EIA's modeling is lacking in a number of respects. For example, EIA's model only provides information through the year 2030, while EPA's model extends out to 2050. Because the effects of the legislation will compound over time, data for the 2030 to 2050 years are critical to having a complete understanding of how the bill will impact the economy. EPA can also provide us with information related to the impact ACES might have on global CO2 concentrations, including information on what might happen if other countries do not participate in emissions reductions schemes or conform to equitable, and consistent international commitments. EIA does not evaluate this type of data in its model, leaving EPA as the only government source that can provide information on whether the bill will have any impact on climate change.

We are interested in getting EPA's complete analysis before the debate over climate change legislation occurs in the Senate. Considering the sheer magnitude of this legislation, which will touch every part of the American economy, Senators should have thorough analyses from both EPA and EIA to facilitate a full, open, and transparent debate on cap-and-trade. Moreover, ACES has been placed on the Senate calendar, and major portions of the bill will likely be part of Senate climate change legislation. And, as the House vote on the bill attests, ACES is the House position on cap-and-trade legislation. If the need arises for a conference committee, Senators must have a complete understanding of the House position and its effect on jobs and the economy.

In its initial analysis, EPA concluded that ACES will cost Americans a mere "postage stamp a day" – an assertion that rests on assumptions that are widely recognized to defy political, practical, and technological realities. Such assertions call into question EPA's ability to produce analysis that is objective and reliable. You seemed to hint as much in your response letter, in which you referred us to EIA's analysis, because, as you wrote, "EIA operates independently of any political appointees and is recognized widely as an independent, rigorous economic modeling resource."

While I understand that passing an economy-wide, cap-and-trade program for greenhouse gasses is a major priority for the Obama Administration, that priority should not compromise EPA's ability to provide the U.S. Senate with a straightforward, comprehensive analysis of ACES. As the Senate considers this legislation or some variant of it, policymakers need analysis that covers the full range of effects from the bill—which includes using real-world assumptions about energy demand, energy supply, energy efficiency, and other issues critical to the bill's implementation and costs to economy. I understand that some speculation will occur and difficult assumptions will be made in predicting the impact of the bill, but every effort should be made to make it as objective as possible.

The seriousness of this issue demands a comprehensive, transparent analysis of the policy proposal now before us. I look forward to talking with you about this matter in the near future.

Sincerely,

George V. Voinovich

George V. Voinovich
United States Senator

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-HQ-OAR-2009-0597; FRL-xxxx-x]

Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of reconsideration; proposed rule.

SUMMARY: In a December 18, 2008 memorandum, EPA established an interpretation of the regulatory phrase "subject to regulation" that is applied to determine the pollutants subject to the federal Prevention of Significant Deterioration (PSD) program under the Clean Air Act (CAA or Act). On February 17, 2009, the EPA Administrator granted a petition for reconsideration of the regulatory interpretation in the memorandum. However, the Administrator did not grant a request to stay the memorandum, so the interpretation remains in effect for the federal PSD program pending completion of this reconsideration action. This notice implements the grant of reconsideration by discussing and requesting public comment on various interpretations of the regulatory phrase "subject to regulation." The interpretations discussed in this notice include our current and preferred interpretation, which would make PSD applicable to a pollutant on the basis of an EPA regulation requiring actual control of

emissions of a pollutant, as well as interpretations that would make PSD applicable to a pollutant on the basis of an EPA regulation requiring monitoring or reporting of emissions of a pollutants, the inclusion of regulatory requirements for specific pollutants in an EPA-approved state implementation plan (SIP), an EPA finding of endangerment, and the grant of a section 209 waiver. This notice also takes comments on related issues and other interpretations that could influence this reconsideration.

DATES: Comments. Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

Public Hearing. If anyone contacts EPA requesting a public hearing by **[INSERT DATE 15 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**, we will hold a public hearing approximately 30 days after publication in the Federal Register.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2009-0597, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- Email: a-and-r-docket@epa.gov.
- Mail: Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW, Washington, DC 20460.
- Hand Delivery: Environmental Protection Agency, EPA West

Building, Room 3334, 1301 Constitution Ave., NW, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2009-0597. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot

contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at http://www.epa.gov/epahome/dockets.htm.

Docket: The December 18, 2008 interpretive memorandum, the petition for reconsideration, and all other documents in the record for this reconsideration are in Docket ID. No. EPA-HQ-OAR-2009-0597. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566-1742.

Public Hearing: If a hearing is held, it will be held at the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Mr. David J. Svendsgaard, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541-2380; fax number: (919) 541-5509; e-mail address svendsgaard.dave@epa.gov.

To request a public hearing, please contact Ms. Pam Long, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541-0641; fax number: (919) 541-5509; e-mail address: long.pam@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities affected by this rule include sources in all industry groups. Entities potentially affected by this rule also include states, local permitting authorities, and tribal authorities. The majority of categories and entities potentially affected by this action are expected to be in the following groups:

Industry Group	NAICS[a]
Utilities (electric, natural gas, other systems)	2211, 2212, 2213
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316
Wood product, paper manufacturing	321, 322
Petroleum and coal products manufacturing	32411, 32412, 32419
Chemical manufacturing	3251, 3252, 3253,3254, 3255, 3256,3259
Rubber product manufacturing	3261, 3262
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369
Furniture and related product manufacturing	3371, 3372, 3379

Miscellaneous manufacturing.....	3391, 3399
Waste management and remediation.....	5622, 5629
Hospitals/Nursing and residential care facilities.....	6221, 6231, 6232,6233, 6239
Personal and laundry services.....	8122, 8123
Residential/private households.....	8141
Non-Residential (Commercial).....	Not available. Codes only exist for private households, construction and leasing/sales industries.

[a] North American Industry Classification System.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this notice will be posted on the EPA's New Source Review (NSR) Web Site, under Regulations & Standards, at www.epa.gov/nsr.

C. What should I consider as I prepare my comments for EPA?

1. Submitting CBI. Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the

outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404-02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA-HQ-OAR-2009-0597.

2. Tips for preparing your comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

D. How can I find information about a possible public hearing?

People interested in presenting oral testimony or inquiring if a hearing is to be held should contact Ms. Pam Long, New Source Review Group, Air Quality Policy Division (C504-03), U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541-0641. If a hearing is to be held, persons interested in presenting oral testimony should notify Ms. Long at least 2 days in advance of the public hearing. Persons interested in attending the public hearing should also contact Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to

present data, views, or arguments concerning these proposed rules.

E. How is the preamble organized?

The information presented in this preamble is organized as follows:

I. General Information
  A. Does this action apply to me?
  B. Where can I get a copy of this document and other related information?
  C. What should I consider as I prepare my comments for EPA?
  D. How can I find information about a possible public hearing?
  E. How is the preamble organized?
II. Background
III. This Action
  A. Overview
  B. Actual Control of Emissions
  C. Monitoring and Reporting Requirement
  D. EPA-Approved State Implementation Plan
  E. Finding of Endangerment
  F. Granting of Section 209 Waiver
  G. Timing of Regulation
  H. Other Issues
IV. Statutory and Executive Order Reviews
  A. Executive Order 12866 - Regulatory Planning and Review
  B. Paperwork Reduction Act
  C. Regulatory Flexibility Act
  D. Unfunded Mandates Reform Act
  E. Executive Order 13132 - Federalism
  F. Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments
  G. Executive Order 13045 - Protection of Children from Environmental Health Risks and Safety Risks
  H. Executive Order 13211 - Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  I. National Technology Transfer and Advancement Act
  J. Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
V. Statutory Authority

II. Background

On December 18, 2008, in order to address an ambiguity that existed in the federal PSD regulations, then-EPA Administrator Stephen Johnson issued a memorandum setting forth the official EPA interpretation regarding which pollutants were "subject to regulation" for the purposes of the federal PSD permitting program. Memorandum from Stephen Johnson, EPA Administrator, to EPA Regional Administrators, RE: EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program (Dec. 18, 2008) ("PSD Interpretive Memo" or "Memo"); see also 73 FR 80300 (Dec. 31, 2008) (public notice of Dec. 18, 2008 memo). The Memo was necessary after issues were raised regarding the scope of pollutants that should be addressed in PSD permitting actions following the Supreme Court's April 2, 2007 decision in Massachusetts v. EPA, 549 U.S. 497 (2007).

In Massachusetts v. EPA, the Supreme Court held that greenhouse gases (GHGs), including carbon dioxide (CO_2), are air pollutants under the CAA. The case arose from EPA's denial of a petition for rulemaking filed by more than a dozen environmental, renewable energy, and other organizations requesting that EPA control emissions of GHGs from new motor vehicles under section 202 of the CAA. The Court found that in accordance with CAA section 202(a), the Administrator was required to determine

whether or not emissions of GHGs from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.[1]

On August 30, 2007, EPA Region VIII issued a PSD permit to Deseret Power Electric Cooperative, authorizing it to construct a new waste-coal-fired electric generating unit near its existing Bonanza Power Plant, in Bonanza, Utah. Final Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct, Permit No. PSD-OU-0002-04.00, Deseret Power Electric Cooperative (Aug. 30, 2007). The Deseret PSD permit did not include best available control technology (BACT) limits for CO_2. In responding to comments received during the permitting process, the Region acknowledged the Massachusetts decision but found that decision alone did not require PSD permits to include limits on CO_2 emissions. Region VIII explained that the requirement for PSD permits to contain BACT emissions limitations for each pollutant "subject to regulation" under the CAA, as found in the CAA section 165(a)(4) and 40 CFR 52.21(b)(12), did not apply to CO_2 emissions because the Agency had historically interpreted the

[1] On April 17, 2009, the EPA Administrator took the first step in the CAA section 202 rulemaking process by proposing endangerment and cause or contribute findings for GHGs under the CAA. 74 FR 18886 (April 24, 2009). **[Placeholder – insert sentence regarding and cite to proposed mobile source standards if already published]**

phrase "subject to regulation" to "describe pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." Region VIII explained that EPA codified this approach by defining the term "regulated NSR pollutant" in 40 CFR 52.21(b)(50) and requiring BACT for "each regulated NSR pollutant" in 40 CFR 52.21(j)(2). See Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct, Permit No. PSD-OU-0002-04.00 (Aug. 30, 2007) at 5-6.

On November 13, 2008, the Environmental Appeals Board (EAB) issued a decision in a challenge to the Deseret PSD permitting decision. In re Deseret Power Electric Cooperative, PSD Appeal No. 07-03 (EAB Nov. 13, 2008) ("Deseret"). In briefs filed in that case, Region VIII and the EPA Office of Air and Radiation maintained the position that the Agency had a binding, historic interpretation of the phrase "subject to regulation" in the federal PSD regulations that required PSD permit limits to apply only to those pollutants already subject to actual control of emissions under other provisions of the CAA. Response of EPA Office of Air and Radiation and Region VIII to Briefs of Petitioner and Supporting Amici (filed March 21, 2008). Accordingly, these EPA offices argued that the regulations contained in 40 CFR Part 75, which require monitoring of CO_2 at

some sources, did not make CO_2 subject to PSD regulation. The order and opinion issued by the EAB remanded the permit after finding that prior EPA actions were insufficient to establish a historic, binding interpretation that "subject to regulation" for PSD purposes included only those pollutants subject to regulations that require actual control of emissions. However, the EAB also rejected arguments that the CAA compelled only one interpretation of the phrase "subject to regulation" and found "no evidence of a Congressional intent to compel EPA to apply BACT to pollutants that are subject only to monitoring and reporting requirements." Thus, the Board remanded the permit to the Region to "reconsider whether or not to impose a CO_2 BACT limit in light of the 'subject to regulation' definition under the CAA." The Board encouraged EPA to consider "addressing the interpretation of the phrase 'subject to regulation under this Act' in the context of an action of nationwide scope, rather than through this specific permitting proceeding." See Deseret at 63-64.

Shortly thereafter, in order to address the ambiguity that existed in the federal PSD program following the EAB's Deseret decision, then-EPA Administrator Stephen Johnson issued the PSD Interpretive Memo. The Memo sets forth the official EPA interpretation regarding which pollutants are "subject to regulation" for the purposes of the federal PSD permitting

program, interpreting the phrase to include pollutants "subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant," while excluding pollutants "for which EPA regulations only require monitoring or reporting." Memo at 1.

On December 31, 2008, EPA received a Petition for Reconsideration of the position taken in the PSD Interpretive Memo from Sierra Club and 14 other environmental, renewable energy, and citizen organizations. Petition for Reconsideration, In the Matter of: EPA Final Action Published at 73 FR 80300 (Dec. 31, 2008), entitled "Clean Air Act Prevention of Significant Deterioration (PSD) Construction Permit Program; Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program." Petitioners argued that the PSD Interpretive Memo "was impermissible as a matter of law, because it was issued in violation of the procedural requirements of the Administrative Procedures Act. . . and the Clean Air Act. . ., it directly conflicts with prior agency actions and interpretations, and it purports to establish an interpretation of the Act that conflicts with the plain language of the statute." Petition at 2. Accordingly, Petitioners requested that EPA reconsider and retract the PSD Interpretive Memo. Petitioners later amended their Petition for Reconsideration to include a request to stay the effect of the Memo pending the outcome of the reconsideration

request. Amended Petition for Reconsideration (filed Jan. 6, 2009).[2]

On February 17, 2009, the EPA Administrator granted the Petition for Reconsideration on the PSD Interpretive Memo, citing to the authority under the Administrative Procedures Act, and announced her intent to conduct a rulemaking to allow for public comment on the issues raised in the Memo and on any issues raised by the opinion of the EAB's Deseret decision, to the extent they do not overlap with the issues raised in the Memo.[3] Administrator Jackson did not stay the effectiveness of the PSD Interpretive Memo pending reconsideration, but she did re-iterate that the Memo "does not bind States issuing [PSD] permits under their own State Implementation Plans." See Letter from Lisa P. Jackson, EPA Administrator, to David Bookbinder, Chief Climate Counsel at Sierra Club (Feb. 17, 2009) at 1.

III. This Action

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[2] On January 15, 2009, a number of environmental organizations that filed this Petition for Reconsideration also filed a petition challenging the PSD Interpretive Memo in U.S. Court of Appeals for the District of Columbia Circuit. Sierra Club v. E.P.A., No. 09-1018 (D.C. Cir., filed Jan. 15, 2009). Thereafter, various parties moved to intervene in that action or filed similar petitions challenging the Memo. The consolidated D.C. Circuit cases have been held in abeyance pending this reconsideration process. Id., Order (filed March 9, 2009).

[3] Because Administrator Jackson's grant of reconsideration directed the Agency to conduct this reconsideration using a notice and comment process, this action does not address the procedural challenge presented in the Petition for Reconsideration.

A. Overview

In accordance with the Administrator's February 17, 2009 letter granting reconsideration, in the sections that follow, we summarize the interpretation contained in the PSD Interpretive Memo regarding when a pollutant becomes "subject to regulation" for the purposes of applying PSD program requirements and the Memo's arguments in support of that interpretation, as well as a summary of Petitioners' main arguments in favor of alternative interpretations, and request public comment on those interpretations.[4] Specifically, this reconsideration action addresses five interpretations of the regulatory phrase "subject to regulation" - the actual control interpretation adopted by the PSD Interpretive Memo; the monitoring and reporting interpretation advocated by Petitioners; the inclusion of regulatory requirements for specific pollutants in SIPs, which is discussed in both the PSD Interpretive Memo and the Petition for Reconsideration;[5] an EPA finding of endangerment, which is

[4] While the sections below provide a summary of the primary arguments contained in the PSD Interpretive Memo and the Petition for Reconsideration, we advise the public to review the original documents in preparing their comments. **[cite to docket]**

[5] As noted previously, the only change between the original Petition (filed Dec. 31, 2008) and the Amended Petition (filed Jan. 6, 2009) is the addition of a request that EPA stay the effect of the PSD Interpretive Memo pending the outcome of the reconsideration request. Since the request for a stay was already denied in the February 17, 2009 letter granting reconsideration, the remainder of this notice references the original Petition when summarizing the arguments contained in those documents.

discussed in the PSD Interpretive Memo; and the grant of a section 209 waiver, which was raised by commenters in another EPA action. EPA is also addressing other issues raised in the PSD Interpretive Memo and related actions that may influence the present reconsideration and request for public comment, as necessary.

Of the five interpretations described in this reconsideration, the EPA continues to favor the "actual control interpretation," which remains in effect at this time. As explained in the following section, the actual control interpretation best reflects our past policy and practice, is in keeping with the structure and language of the statute and regulations, and best allows for the necessary coordination of approaches to controlling emissions of newly identified pollutants. While the other interpretations described herein may represent alternatives for interpreting "subject to regulation," no particular one is compelled by the statute, nor did the EAB determine that any one of them was so compelled. Because we have overarching concerns over the policy and practical application of each of the other interpretations, as discussed in more detail later in this notice, we are inclined to adopt the actual control interpretation as our final interpretation. Nevertheless, in this notice, we are requesting comment on a wide range of issues

related to each of these interpretations and will carefully consider those comments before reaching a final decision.

As a general matter, the stated purpose of the PSD Interpretive Memo is to "establish[] an interpretation clarifying the scope of the EPA regulation that determines the pollutants subject to the federal Prevention of Significant Deterioration (PSD) program under the Clean Air Act (CAA or Act)" by providing EPA's "definitive interpretation" of the definition of the term "regulated NSR pollutants" found at 40 CFR 52.21(b)(50) and resolving "any ambiguity in subpart ([iv]) of that paragraph, which includes 'any pollutant that otherwise is subject to regulation under the Act.'" Memo at 1. As the Memo explains, the statute and regulation use similar language – the regulation defines a regulated NSR pollutant to include "[a]ny pollutant that otherwise is subject to regulation under the Act" and requires BACT for "each regulated NSR pollutant," 40 CFR 52.21(b)(50) and (j), while the Act requires BACT for "each pollutant subject to regulation under this [Act]," CAA sections 165(a)(4) and 169. The EAB has already determined that "the meaning of the term 'subject to regulation under this Act' as used in [CAA] sections 165 and 169 is not so clear and unequivocal as to preclude the Agency from exercising discretion in interpreting the statutory phrase" in implementing the PSD program. Deseret at 63.

The PSD Interpretive Memo seeks to resolve the ambiguity in implementation of the PSD program by stating that "EPA will interpret this definition of 'regulated NSR pollutant' to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant." The Memo states that "EPA has not previously issued a definitive interpretation of the definition of 'regulated NSR pollutant' in section 52.21(b)(50) or an interpretation of the phrase 'subject to regulation under the Act' that addressed whether monitoring and reporting requirements constitute 'regulation' within the meaning of this phrase." The Memo, however, explains that the interpretation reflects the "considered judgment" of then-Administrator Johnson regarding the PSD regulatory requirements and is consistent with both historic Agency practice and prior statements by Agency officials. See Memo at 1-2.

The Petition for Reconsideration generally argues that the interpretation in the Memo "misconstrues the plain language of the Act, adopts impermissible interpretations of existing regulations, and ignores the distinct purpose of the PSD program." Petitioners assert that the PSD Interpretive Memo "attempts to revive a definition [of "subject to regulation"]

that the EAB found was not supported by any prior interpretation of the statute." The Petition also claims that CO_2 is a pollutant "subject to regulation" for the purposes of the PSD program because CO_2 emissions are already regulated under an existing SIP and existing monitoring and reporting requirements. See Petition at 9-10.

Although EPA issued the Memo after the EAB's Deseret decision, which specifically concerned whether CO_2 emissions should be considered "subject to regulation," the PSD Interpretive Memo establishes an interpretation of "subject to regulation" that applies generally to the PSD program and the treatment of all pollutants under that program. Petitioners requested reconsideration of the entire PSD Interpretive Memo, but their arguments primarily address the Memo's application to CO_2 and only address the broader applicability of the PSD program to other pollutants as a secondary matter. Issues of general and specific PSD applicability are somewhat interchangeable, but it is important to address the pollutant applicability issue for the PSD program as a whole. Accordingly, Petitioners primarily address the application of the various interpretations to CO_2, we will generally focus this reconsideration on the application of the interpretation of the definition of "subject to regulation" to all pollutants, instead of focusing on the specific applicability to CO_2 or GHGs, including particular actions that

Petitioners argue have triggered PSD requirements for those pollutants. This will allow us to uniformly apply the final interpretation in the future as new pollutants become potentially "subject to regulation."

B. Actual Control of Emissions

The PSD Interpretive Memo established that EPA will interpret the "subject to regulation" provision of the "regulated NSR pollutant" definition "to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant." (Hereinafter, referred to as the "actual control interpretation.") In so doing, the Memo observes that the EAB rejected claims that the language of the CAA compelled only one interpretation of the phrase "subject to regulation," and instead found that the phrase is ambiguous.

The PSD Interpretive Memo explains that the "structure and language of EPA's definition of 'regulated NSR pollutant' at 40 CFR 52.21(b)(50)" supported the actual control interpretation. The Memo discusses how the first three parts of the definition describe pollutants that are subject to regulatory requirements that mandate control or limitation of the emissions of those pollutants, which suggests that the use of "otherwise subject to regulation" in the fourth prong also intended some prerequisite act or process of control. The Memo also explains that the

definition's use of "subject to regulation" should be read in light of the primary meaning of "regulation" in various dictionaries, which each used or incorporated a control requirement. See Memo at 6-9.

The PSD Interpretive Memo observes that the actual control interpretation is consistent with EPA's broad responsibilities under the CAA. The Memo explains that the actual control interpretation gives a broad scope to the PSD permitting program while instilling "reasonable boundaries" for administration of the program in an "effective, yet manageable," way. The Memo also explains that important policy concerns support application of PSD requirements only after actual control requirements are in place under another part of the Act, because the actual control interpretation: (1) allows the Agency to assess "whether there is a justification for controlling" those emissions based on relevant criteria in the Act; (2) provides an opportunity for public notice and comment when a new pollutant is proposed to be regulated under other portions of the Act; (3) promotes "the orderly administration of the permitting program by providing an opportunity for EPA to develop regulations to manage the incorporation of a new pollutant into the PSD program"; (4) preserves EPA's "ability to gather information to inform the Administrator's judgment regarding the need to establish controls on emissions"; and (5) safeguards the Administrator's authority

to require such controls on individual pollutants under other portions of the Act before triggering PSD requirements. Finally, the Memo clarifies that while the "subject to regulation" interpretation issue had been raised in the context of CO_2 emissions, "adoption of [the actual control] interpretation is also necessary to preserve EPA's ability to collect emissions data on other pollutants for research and other purposes," both now and in the future, without triggering the requirements of the PSD permitting program. See Memo at 9-10.

The PSD Interpretive Memo next describes how an actual control interpretation of "subject to regulation" is "consistent with the historic practice of the Agency and with prior statements by Agency officials." The Memo explains that a review of numerous federal PSD permits shows that EPA has been applying the actual control interpretation in practice – issuing permits that only contained emissions limitations for pollutants subject to regulations requiring actual control of emissions under other portions of the Act. The Memo also articulates that in 1998, well after promulgation of the CO_2 monitoring regulations, the EPA found CO_2 to be a pollutant under the Act and stated that EPA had the authority to regulate it, but found "the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act."[6] The PSD Interpretive Memo explains that the 1978 Federal

Register notice promulgating the initial PSD regulations, which stated that pollutants "subject to regulation" in the PSD program included "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations," is not inconsistent with the actual control interpretation because actual control could be inferred by the specific list of regulated pollutants that followed the reference to 40 CFR. See Memo at 10-13.

Finally, the PSD Interpretive Memo finds that the actual control interpretation is supported, and not precluded, by the language and structure of the CAA. The Memo notes that the EAB had already concluded that the CAA's use of the phrase "subject to regulation under this Act" was ambiguous and susceptible to various interpretations, and explains that the Board determined that "the terms of the statute do not preclude reading 'subject to regulations under this Act' to mean 'subject to control' by virtue of a regulation or otherwise." The Memo argues that the actual control interpretation was consistent with Congress' specification that BACT control under PSD "could be no less stringent than NSPS [i.e., New Source Performance Standards] and other control requirements under the Act indicates that Congress expected BACT to apply to pollutants controlled under these

[6] Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (April 10, 1998).

programs." The Memo also finds support for the actual control interpretation in the non-PSD portions of the Act, reasoning that similar to those CAA sections that authorized the Administrator to establish emissions limitations or controls under other programs, Congress "expected that pollutants would only be regulated for purposes of the PSD program after the Administrator has promulgated regulations requiring control of a particular pollutants. [*sic*]" See Memo at 13-14.

In contrast, the Petition for Reconsideration argues that in putting forth the actual control interpretation, the PSD Interpretive Memo "attempts to revive" a definition of "subject to regulation" that was not supported by the EAB's Deseret decision. Petition at 9-10. With regard to the Memo's assertion that the interpretation is supported by the language and structure of the "regulated NSR pollutant" definition, Petitioners disagree. The Petition argues that the Memo placed undue emphasis on the PSD regulation while "[i]n reality, the [PSD Interpretive] Memo is interpreting the language of the statute" because the regulation "simply parrots" the language contained in the Act. As such, Petitioners claim that the Agency's actual control interpretation is not entitled to any deference. Petitioners also argue that the Memo improperly relied on the other prongs of the definition in finding an actual control interpretation, contending that the EAB already rejected

that type of analysis and that the first three prongs referred to a promulgated "standard" (and not to controls) such that the last prong should apply to pollutants regulated in some other way than a standard. See Petition at 18-20.

The Petition asserts that the PSD Interpretive Memo improperly relies on a number of Agency documents in arriving at the actual control interpretation. Petitioners argue that the EAB already determined that "the only relevant interpretation of the applicable statutory and regulatory language was to be found in EPA's 1978 PSD rulemaking" (emphasis in original) and that the 1978 preamble interpretation "directly contradicted EPA's theory" regarding an actual control interpretation. Petitioners also note that the EAB determined that the interpretation of "subject to regulation" found in the 1978 preamble language suggests that the phrase includes "any pollutant covered by a regulation in Subchapter C of Title 40 of the CFR, such as CO_2." Petitioners argue that the Memo improperly attempts to alter the still-applicable 1978 interpretation because the EAB already rejected reliance on the types of control requirements identified following the "subject to regulation" sentence in the 1978 preamble, and because there is no ambiguity in the language used in the 1978 preamble's interpretation. See Petition at 3 and 15-18.

The Petition for Reconsideration also contends that the PSD Interpretive Memo ignores the plain language of the CAA because CO_2 is clearly "subject to regulation under the Act." With regard to the EAB's finding of ambiguity in the Act's use of "subject to regulation," Petitioners simply note that "[t]o the extent the EAB declined to hold that the PSD provision requires use of BACT for CO_2 emissions, [Petitioners] disagree with the Board's decision in that case." Petition at footnote 10. Petitioners assert that the Memo's reliance on the structure of the CAA contradicts the broad purpose of regulation under the PSD program. The Petition asserts that Congress "deliberately established a much lower threshold" for requiring PSD control mechanisms than they did when "establishing generally applicable standards such as the NAAQS, [NSPS], or motor vehicle standard." Petition at 21.

With this reconsideration, we note the policy and legal arguments stated in the PSD Interpretive Memo, and summarized above, for the actual control interpretation. This interpretation remains our preference for a number of reasons. The Memo explains that this interpretation best reflects our past policy and practice, as applied consistently over the years. The Memo also describes why such an interpretation allows for a more practical development of regulations and guidance concerning control of pollutants once they are determined to endanger public

health or welfare. Triggering PSD prior to a judicious review of the pollutant's health and environmental effects, as well as its emission characteristics and control options for different source types, could lead to serious implementation consequences for the program as a whole. As part of this reconsideration, we request comment on whether the policy concerns EPA described in the PSD Interpretive Memo, as well as those noted in the Petition for Reconsideration, are also of concern to commenters.

For example, the Memo notes the importance of providing EPA the time to collect and assess data on newly identified pollutants prior to undertaking PSD reviews and determining emission control requirements. Without this time, the EPA's ability to make regulatory decisions that are based on analysis of a robust and relevant dataset on a pollutant would be significantly hampered. Furthermore, without this prior review period, individual technical BACT reviews could be time-consuming due to the need to research and develop the generally available emission control options for a new pollutant about which this information is not well known. Triggering PSD with actual control interpretation would also allow EPA to review and promulgate a significant emissions rate (SER) for a pollutant before it would be subject to PSD permitting requirements, so that de minimis increases in emissions are not automatically captured, thus hindering efficient implementation of the program.

Thus, the actual control interpretation allows the greatest opportunity for the EPA to address whether and how a pollutant should be "subject to regulation" based on the promulgation of more general control requirements.

This opportunity extends not only to CO_2 and other GHGs, but to non-GHG pollutants that may, in the future, become regulated NSR pollutants. Therefore, we request comment on the importance of affording EPA the necessary time to study and evaluate the emissions characteristics and control options for new pollutants prior to making emissions of those pollutants subject to PSD permitting requirements. Similarly, we ask for comment on the extent to which the availability of such time under the actual control interpretation should weigh in our consideration of whether to adopt this approach. Finally, we seek comment on any other policy factors we should consider that are not addressed in the Memo or the Petition for Reconsideration that would weigh for or against the actual control interpretation.

C. Monitoring and Reporting Requirement

In addition to finding that the actual control interpretation should be applied to the federal PSD program, the PSD Interpretive Memo also rejects an interpretation of "subject to regulation" in the regulated NSR pollutant definition that would have applied to pollutants for which EPA regulations only require monitoring or reporting. (Hereinafter, referred to as

the "monitoring and reporting interpretation."). The Memo begins by noting that the EAB's Deseret decision found "no evidence of a Congressional intent to compel EPA to apply BACT to pollutants that are subject only to monitoring and reporting requirements." Memo at 4. The Memo finds such an interpretation is inconsistent with important policy considerations, past Agency practice and statements, and an overall reading of the CAA.

In describing policy concerns arising from the monitoring and reporting interpretation, the PSD Interpretive Memo explains that "requiring [PSD emissions] limitations automatically for pollutants that are only subject to data gathering and study would frustrate EPA's ability to accomplish several objectives of the Clean Air Act." The Memo explains that administration of the CAA's pollutant control programs relies on reasoned decision-making that is often based on collection of emissions data under CAA section 114(a)(1). The Memo predicts that adopting the monitoring and reporting interpretation would impair EPA's decision-making, leading to the "perverse result" of requiring PSD limits for a pollutant while the Agency is still deciding whether to establish controls on that pollutant under other parts of the Act. The Memo also stresses that the monitoring and reporting interpretation had broader implications than PSD limits for CO_2 because it would apply to other pollutants that may emerge in the future. See Memo at 9-10.

The PSD Interpretive Memo also finds that the monitoring and reporting interpretation is inconsistent with past agency practice because "EPA has not issued PSD permits containing emissions limitations for pollutants that are only subject to monitoring and reporting requirements," including CO_2 emissions. The Memo determines that the monitoring and reporting interpretation is not required under the 1978 preamble language, explaining that the preamble language could be interpreted in a variety of ways and "did not specifically address the issue of whether a monitoring or reporting requirement makes a pollutant 'regulated in' [Subpart C of Title 40] of the Code of Federal Regulations." See Memo at 11-12.

Finally, the PSD Interpretive Memo articulates that the monitoring and reporting interpretation is not required by the language of the CAA. The Memo emphasizes that the EAB rejected arguments that the language of the CAA required application of the monitoring and reporting interpretation, instead finding "no evidence of Congressional intent to compel EPA to apply BACT to pollutants that are subject only monitoring and reporting requirements." The Memo reasons that the overall regulatory direction given to EPA in the CAA is "evidence that Congress generally expected that EPA would gather emissions data prior to establishing plans to control emissions or developing emissions limitations" and finds rejection of the monitoring and reporting

interpretation "fully consistent with Congressional design." See Memo at 4.

The Petition for Reconsideration asserts that applying the monitoring and reporting interpretation to the PSD program is appropriate because "monitoring and reporting requirements clearly constitute regulation" and CO_2 emissions are subject to PSD permitting requirements based on the existing requirement to monitor and report CO_2 emissions. Petitioners state that the policy concerns expressed in the Memo are a "red herring" because "EPA has not identified a single pollutant other than CO_2 that would be affected by an interpretation of 'regulation' in Section 165 to include monitoring and reporting regulations." The Petition argues that EPA can gather pollutant information about pollutants under Section 114 without adopting regulations, and thus avoid triggering PSD requirements for those pollutants. See Petition at 13 and 22.

The Petition stresses that the PSD Interpretive Memo could not eliminate the monitoring and reporting interpretation based on concerns about applying it to future pollutants because Congress could choose to expressly exclude future pollutants from PSD requirements in express terms. Petitioners also argue that the Memo does not provide a statutory provision to support the claim that requiring BACT for pollutants under a monitoring and reporting interpretation would conflict with the information-

gathering objectives of the CAA. The Petition also contends that the Memo fails to demonstrate anything "unworkable" about requiring PSD for pollutants subject to monitoring regulations. See Petition at 22-23.

Finally, Petitioners assert that CO_2 is clearly "subject to regulation" under the interpretation provided in the 1978 preamble language because the CO_2 monitoring and reporting regulations are contained in the Subpart C of Title 40 of the CFR. Petitioners contend that the CO_2 monitoring and reporting requirements meet the statutory and regulatory definition of "subject to regulation" and have the force of law in the same way as control requirements. The Petition also claims that each of the dictionary definitions of "regulation" relied upon in the Memo would include monitoring. Petitioners also contend that a monitoring and reporting interpretation is consistent with an actual control requirement because there must be some control of pollutant emissions in order to monitor them. See Petition at 14-16.

We note that the EAB already found "no evidence of Congressional intent to compel EPA to apply BACT to pollutants that are subject only monitoring and reporting requirements." Deseret at 63. In light of that finding, we request comment on the arguments made in the Memo and discussed further in this reconsideration proposal. Our review of the arguments in the PSD

Interpretive Memo indicates that a monitoring and reporting interpretation would be unlikely to preserve the Agency's ability to conduct monitoring or reporting for investigative purposes to inform future rulemakings involving actual emissions control or limits. The Petition for Reconsideration argues that these concerns are a "red herring" because EPA has not identified a pollutant other than CO_2 that would be affected by the monitoring and reporting interpretation. We believe that additional comment would assist us in evaluating this concern.

However, we also note that EPA has issued regulations, such as NSPS, that require monitoring of noncriteria pollutant emissions in order to demonstrate compliance with the regulation on the criteria pollutant(s). For example, one of our NSPS stipulates that if a source uses Continuous Emissions Monitoring Systems (CEMS) to measure emissions of NO_x and SO_2 from its boiler, the source must also have a CEMS to measure oxygen gas (O_2) or CO_2. See 40 CFR 60.49Da(b) and (c). Clearly, there is no intent by the EPA to consider O_2 as "subject to regulation," and therefore subject to PSD, as a result of this NSPS requirement, but the application of the monitoring and reporting interpretation as put forward in the Petition could require just that.

In addition, it is not always possible to predict when a new pollutant will emerge as a candidate for regulation. In such

cases, the Memo's reasoning is correct in that we would be unable to promulgate any monitoring or reporting rule for such a pollutant without triggering PSD under this interpretation. Nonetheless, we seek additional comment on the extent to which our interest in preserving the ability to investigate unregulated pollutants as stated in the memo is a real, rather than hypothetical, concern. We further seek comment on any other policy factors we should consider that are not addressed in the Memo or the Petition for Reconsideration that would weigh for or against the monitoring and reporting interpretation.

D. EPA-approved State Implementation Plan

In discussing the application of the actual control interpretation to specific actions under the CAA, the PSD Interpretive Memo rejects an interpretation of "subject to regulation" in which regulatory requirements for an individual pollutant in the SIP for a single state would "require regulation of that pollutant under the PSD program nationally." (Hereinafter, referred to as the "SIP interpretation.") The Memo reasons that application of the SIP interpretation would convert EPA's approval of regulations applicable only in one state into a decision to regulate a pollutant on a nationwide scale for purposes of the PSD program. The PSD Interpretive Memo explains that the establishment of SIPs is better read in light of the "cooperative federalism" underlying the Act, whereby Congress

allowed individual states to create and apply some regulations more stringently than federal regulations within its borders, without allowing individual states to set national regulations that would impose those requirements on all states. In rejecting the SIP interpretation, the PSD Interpretive Memo also explains that a similar position had been adopted in EPA's promulgation of the NSR regulations for fine particulate matter (or "$PM_{2.5}$"), without any public comments opposing that position. See Memo at 15-16.

The Petition for Reconsideration argues that the SIP interpretation is appropriate for the PSD program and applies to CO_2 emissions at this time. Petitioners note that the Delaware SIP established regulations limiting CO_2 emissions in 2008 and that, in approving that SIP provision, EPA stated it was doing so under the CAA, thus making the CO_2 standards enforceable under various provisions of the CAA. The Petition argues that the Memo rejected the SIP interpretation without providing a relevant statutory or regulatory basis for that position. Instead, Petitioners claim that the SIP interpretation is directly supported by the plain language of "subject to regulation under the Act" because those emissions are restricted under the CAA, whether in one state or all. Finally, the Petition asserts that because SIP regulations are incorporated into Subpart C of Title 40 of the CFR after approval by EPA, the SIP interpretation must

apply given the 1978 preamble language interpreting "subject to regulation" for the PSD program. See Petition at 10-12.

EPA continues to believe that the CAA and our implementing regulations are intended to provide states flexibility to develop and implement SIPs to meet the air quality goals of their state. Each state's implementation plan is a reflection of the air quality concerns in that state, allowing a state to dictate treatment of specific pollutants of concern (or their precursors) within its borders based on air quality, economic, and other environmental concerns of that state. As such, pollutant emissions in one state may not present the same problem for a state a thousand miles away. As expressed in the PSD Interpretive Memo, we have concerns that the SIP interpretation would improperly limit the flexibility of states to develop and implement their own air quality plans because the act of one state to establish regulatory requirements for a particular pollutant would drive national policy by determining that a new pollutant is "subject to regulation," thus requiring all states to subject the new pollutant to PSD permitting. Whether one state, five states, or 45 states make the decision that their air quality concerns are best addressed by imposing regulations on a new pollutant, we do not think those actions should trump the cooperative federalism inherent in the CAA. While several states may face similar air quality issues and may choose regulation as

the preferred approach to dealing with a particular pollutant, we are concerned that allowing the regulatory choices of some number of states to impose PSD regulation on all other states would do just that.

The SIP interpretation could have significant negative consequences to the PSD program and the ability for states to manage their own air quality programs. One practical effect of allowing state-specific concerns to create national policy upon EPA's approval of a state's preferred implementation policy is that EPA's review of SIPs would likely be much more time-consuming, since we would have to consider each nuance of the SIP as a potential statement of national policy. Thus, there would be heightened oversight of air quality actions in all states – even those regarding local and state issues that are best decided by local agencies – for fear of having a national policy compelled by the action of one state. Given the need for states to effectively manage their own air quality programs, we believe "subject to regulation under the Act" is best interpreted as those pollutants subject to a nationwide standard, binding in all states, that EPA promulgates on the basis of its CAA rulemaking authority.

Although we remain concerned about the consequences to the PSD program of the SIP interpretation as described in the Memo, we are seeking comment on the issues raised in the Petition for

Reconsideration. However, our request for comment is limited because we have already finalized a position very similar to that in the Memo in our final NSR implementation rule for $PM_{2.5}$ (73 FR 28321, May 16, 2008). As we explained in the final rule, we adopted the position contained in the proposed rule without receiving any public comments opposing that position. That final rule did not require ammonia to be regulated as a $PM_{2.5}$ precursor but did give states the option to regulate ammonia as a precursor to $PM_{2.5}$ in nonattainment areas for purposes of NSR on a case-by-case basis. In that final rule, we explained that if a state demonstrates to the Administrator's satisfaction that ammonia emissions in a specific nonattainment area are a significant contributor to that area's ambient $PM_{2.5}$ concentrations, the state would regulate ammonia as a $PM_{2.5}$ precursor under the NSR program in that nonattainment area. We explained that once this demonstration is made, ammonia would be a "regulated NSR pollutant" under nonattainment NSR for that particular nonattainment area. In all other nonattainment areas in that state and nationally, ammonia would not be subject to the NSR program. With regard to PSD, we specifically stated that "the action of any State identifying ammonia emissions as a significant contributor to a nonattainment area's $PM_{2.5}$ concentrations, or [EPA's] approval of a nonattainment SIP doing so, does not make ammonia a regulated NSR pollutant for the

purposes of PSD" in any areas nationally. See 73 FR 28330 (May 16, 2008). Therefore, we request comment on the question of whether there is a basis that can be upheld under the Act and our CAA implementing regulations that would allow for application of a different SIP-based interpretation than the interpretation established in that final $PM_{2.5}$ NSR implementation rule. If so, we ask for comment on how the adoption of that different interpretation could be done in a way that addresses the policy concerns with this approach that were raised in the Memo.

E. Finding of Endangerment

In providing the reasoning as to which actions make a pollutant "subject to regulation" for the purposes of the PSD program, the PSD Interpretive Memo states that the "otherwise subject to regulation" prong of the regulated NSR pollutant definition should not be interpreted "to apply at the time of an endangerment finding." Memo at 14. (Hereinafter, referred to as the "endangerment finding interpretation.") As explained in the Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the CAA, there are actually two separate findings involved in what is often referred to as an endangerment finding. 74 FR 18886 (April 24, 2009). First, whether air pollution may reasonably be anticipated to endanger public health or welfare, and second, whether emissions from the relevant source category cause or contribute to this air

pollution. In that proposal, we referred to the first finding as the endangerment finding, and the second as the cause or contribute finding. Often, however, both tests are referred to collectively as the endangerment finding. In this reconsideration package, we will consider the phrase "endangerment finding" to refer to both findings.

The only reference to an endangerment finding in the Petition for Reconsideration is in the argument that Congress "clearly intended that BACT apply regardless of whether an endangerment finding had been made for that pollutant." However, the Petition does not argue that an endangerment finding itself should trigger PSD requirements. In fact, Petitioners argue against the endangerment finding interpretation, stating that Congress "deliberately established a much lower threshold for requiring BACT than an 'endangerment finding.'" See Petition at 21.

The issue of whether "lower thresholds" (such as monitoring and reporting requirements) should make a pollutant "subject to regulation" within the meaning of the PSD program is already being addressed in other sections of this notice. However, in accordance with the February 17, 2009 grant of reconsideration, EPA has reconsidered the endangerment finding interpretation included in the PSD Interpretive Memo and proposes to reaffirm that an endangerment finding is not an appropriate trigger for

PSD regulation. To be clear, this proposed affirmation applies to both steps of what is often referred to as the endangerment finding - the finding that air pollution may reasonably be anticipated to endanger public health or welfare and the finding that emissions of an air pollutant from a particular source category causes or contributes to this air pollution - regardless of whether the two findings occur together or separately.

As the PSD Interpretive Memo explains, an endangerment finding should not be construed as "regulating" the air pollutant(s) at issue. It is, rather, a prerequisite to issuing regulations that themselves impose control requirements. As such, it is unlike the other triggering actions identified in the "regulated NSR pollutant" definition, which set standards that require imposition of actual limitations on emissions that a source or sources must comply with. An endangerment finding, a cause or contribute finding, or both, on the other hand, do not contain or require source limits that are backed by rule of law; rather, they are often the first step required before EPA may set specific emissions limits through a rule.

Furthermore, the other actions addressed in the "regulated NSR pollutant" definition weigh against the endangerment finding interpretation. Under the first prong of that definition, PSD regulation is triggered by promulgation of a National Ambient Air Quality Standard (NAAQS) under CAA section 109. However, in

order to promulgate NAAQS standards under section 109, EPA must list and identify air quality criteria for a pollutant under section 108, CAA section 109(a)(1)(A), which in turn can only happen after the Administrator makes an endangerment finding and a version of a cause or contribute finding, CAA section 108(a)(1)(A)-(B), in addition to meeting other requirements, see CAA section 108(a)(1)(C). Thus, if we were to find that an endangerment finding and/or cause or contribute findings would make a pollutant "subject to regulation" within the meaning of the PSD program, it would read all meaning out of the first prong of the "regulated NSR pollutant" definition because a pollutant would become subject to PSD permitting requirements well before the promulgation of the NAAQS under 109. 40 CFR 52.21(b)(50)(i).

Similarly, the second prong of the definition of "regulated NSR pollutant" includes any pollutant that is subject to a standard promulgated under section 111 of the CAA. Section 111 requires the Administrator to list a source category, if in his or her judgment, "it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA section 111(B)(1)(A). After EPA lists a source category, it promulgates NSPS for that source category. For a source category not already listed, if we were to list it on the basis of its emissions of a pollutant that was not previously regulated, and such a listing made that pollutant

"subject to regulation" within the meaning of the PSD program, this chain of events would result in triggering PSD permitting requirements for that pollutant well in advance of the point contemplated by the second prong of the regulated NSR pollutant definition. 40 CFR 52.21(b)(50)(ii).

In addition, as explained in the Memo, waiting to apply PSD requirements until after the actual promulgation of control requirements that follow an endangerment finding "makes sense." The Memo explains that when promulgating the final regulations establishing the control requirements for a pollutant, EPA often makes decisions that are also relevant to decisions that must be made in implementing the PSD program for that pollutant. See Memo at 14. For example, EPA often does not make a final decision regarding how to identify the specific pollutant subject to an NSPS standard until the NSPS is issued, which occurs after both the endangerment finding and the source category listing.

Accordingly, we believe that the prerequisite act of making an endangerment finding, a cause or contribute finding, or both, should not make a pollutant "subject to regulation" for the purposes of the PSD program. As explained above, EPA believes that there are strong legal and policy reasons for rejecting the endangerment finding interpretation. EPA seeks comment on any other policy factors or legal arguments that are not addressed

above but could weigh for or against our consideration of the endangerment finding interpretation.

F. Granting of Section 209 Waiver

While neither the PSD Interpretive Memo nor the Petition for Reconsideration raise the issue of whether a decision to grant a waiver under the section 209 of the CAA would trigger PSD requirements under the CAA section 165(a)(4), EPA received comments in response to the proposed grant of a CAA section 209 waiver to the state of California to establish GHG emission standards for new motor vehicles that suggested that arguments might be made that the grant of the waiver made GHGs subject to regulation for the purposes of PSD. See 74 FR 32744, 32783 (July 8, 2009). Those commenters requested that EPA state clearly that granting the California Waiver did not render GHGs "subject to regulation" under the CAA, while others commented that the question of when and how GHGs should be addressed in the PSD program or otherwise regulated under the Act should instead be addressed in separate proceedings. At that time, EPA stated that the PSD interpretation issues were not a part of the waiver decision and would be more appropriately addressed in another forum.

Accordingly, we are taking this opportunity to state our position that a decision to grant a CAA section 209 waiver to the state of California to establish GHG emission standards for new

motor vehicles does not trigger PSD requirements for GHGs. As explained below, EPA does not interpret the CAA or the Agency's PSD regulations to make the PSD program applicable to pollutants that may be regulated by states after EPA has granted a waiver under section 209 of the CAA.

As the EPA Administrator previously explained to Congress, "a decision to grant a waiver under section 209 of the Act removes the preemption of state law otherwise imposed by the Act. Such a decision is fundamentally different from the decisions to establish requirements under the CAA that the Agency and the [EAB] have considered in interpreting the provisions governing the applicability of the PSD program." Letter from Lisa P. Jackson to Senator James M. Inhofe (March 17, 2009). As explained more fully below, the decision to grant a CAA section 209 waiver is different from the other actions that have been alleged to trigger the statutory and regulatory PSD requirements, including the other interpretations of "subject to regulation" discussed above, in two key respects.

First, a waiver granted under CAA section 209(b)(1) simply removes the prohibition found in section 209(a) that forbids states from adopting or enforcing their own standards relating to control of emissions from new motor vehicles or new motor vehicle engines. Thus, the grant of the waiver simply allows California the authority to adopt and enforce state emissions

standards for new motor vehicles that it would have otherwise had without the initial prohibition in section 209(a). As EPA previously explained, by removing the section 209(a) prohibition, the waiver "merely gives back to California what was taken away by section 209(a) - the ability to adopt and enforce its own state emission standards." See 74 FR 32751 (July 8, 2009). Importantly, granting the waiver does not itself establish any federal emission standards or other federal requirements for the pollutants. Courts have recognized such a distinction. See American Automobile Manufacturers Association v. Commissioner, Massachusetts Department of Environmental Protection, 31 F.3d 18, 21 (1st Cir. 1994) (stating that "there can be only two types of cars 'created' under emissions regulations in this country: 'California' cars and 'federal' (that is, EPA-regulated) cars"). Thus, grant of a section 209 waiver to the California emissions standards does not render those standards to be federal standards and does not make a

pollutant covered by the California standards "subject to regulation" under the CAA. [7]

[7] EPA recognizes that two courts have addressed the issue of whether the California motor vehicle standards have the effect of federal standards once a § 209 waiver is granted, but those cases are not applicable to our current determination because they did not involve interpretation of the CAA. Those cases were examining whether the California standards were "other motor vehicle standards of the government" under the specific provisions of the Energy Policy and Conservation Act (EPCA). See Century Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F.Supp. 2d

Second, enforcement of any emission standard that might be established after a waiver is granted would occur pursuant to regulation under state law, not regulation "under the Act."

1151 (E.D. Cal. 2007), appeals pending Nos. 08-17378, 08-17380 (9th Cir., filed Oct. 30, 2008); Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F.Supp. 2d 295 (D. Vt. 2007)). In those cases, automobile dealers and manufacturers brought action challenging the validity of the California GHG emissions standards, arguing that the standards were preempted by the fuel economy standards established by EPCA. After examining the statutory language and legislative history of EPCA, the courts found that the EPCA fuel standards were not preemptive of the California standards. The courts noted that the term "Federal standards fuel economy reduction" as used in the original codification of section 502(d) of the Energy Policy and Conservation Act (EPCA), referred to EPA-approved California emission standards, and noted that "there is nothing in [EPCA] or in case law to support the proposition that a regulation promulgated by California and granted waiver of preemption under [CAA] section 209 is anything other than a 'law of the Government' whose effect on fuel economy must be considered by NHTSA in setting fuel economy standards." Century Valley Chrysler-Jeep, 529 F.Supp. 2d at 1173. See also Green Mountain Chrysler Plymouth Dodge Jeep, 508 F.Supp. 2d at 347.

However, these Courts did not examine whether California standards were federal standards under the specific provisions of the CAA. Accordingly, their holdings are properly limited to interpretation of EPCA's preemption provisions and are not binding on our present consideration of whether the California standards should be considered federal standards under the provisions of the CAA, in particular, provisions such as the PSD program. As noted above, a waiver granted to California motor vehicle emissions standards does not preempt the federal CAA standards but instead lifts the preemption that the Act would normally have under CAA § 209(a). Accordingly, we believe these courts' determinations that the California emissions standards were a type of "Federal standards fuel economy reduction" that were not preempted by EPCA's fuel economy provisions do not change the fact that the California standards are not federal standards that EPA adopts or enforces as part of its CAA regulatory program, and thus should not trigger PSD permitting requirements.

Specifically, section 209(b)(3) of the CAA provides that for any new motor vehicle to which state emission standards apply pursuant to a waiver granted under section 209(b)(1), "compliance with such State standards shall be treated as compliance with applicable Federal standards" for purposes of Title II of the Act. This provision was added when Congress amended section 209 to allow some California standards to be less stringent than federal standards as long as California's standards are "in the aggregate" at least as protective of human health and the environment. Section 209(b)(3) ensures that a vehicle complying with California's standards for which a waiver has been granted, but not necessarily all federal standards, is not subject to enforcement under the Act for failure to meet all federal standards. However, EPA would not enforce California's standards as it would its own. Although the California standards for which EPA has granted a waiver include GHG emissions standards, EPA's granting of a waiver does not promulgate those GHG standards as EPA standards, nor does it lead to EPA enforcement of those GHG standards. Therefore, the grant of a waiver to California does not render GHG emissions subject to regulation under the CAA.

We are also aware that some states have chosen, pursuant to section 177 of the CAA, to adopt the California low emission vehicle (CAL LEV) program into their state pollution control programs, including specific pollutant emissions standards that

are included in CAL LEV after the grant of a section 209 waiver. However, for the same reasons as discussed above, the adoption of those standards by other states under section 177 does not change the fact that those standards are still state standards enforced under state law. Accordingly, we find that adoption of waived standards pursuant to CAA section 177 should not trigger PSD requirements for the pollutants included in those standards.[8]

Accordingly, we believe that neither the act of granting a section 209 waiver for emission standards nor the adoption of such standards pursuant to section 177 makes a pollutant "subject to regulation" for the purposes of the PSD program. EPA believes there is strong legal support for this position. EPA requests comment on this position and any other legal or policy factors that weigh for or against our consideration of the grant of a section 209 waiver interpretation.

G. Timing of Regulation

[8] To the extent that some states adopt the CAL LEV emission standards pursuant to section 177 and then incorporate by reference those standards into their SIPs, including the emission standards included in the CAL LEV program pursuant to a section 209 waiver, the PSD Interpretive Memo already expressed the view that inclusion of a pollutant standard in a SIP does not make that pollutant subject to the PSD program requirements. While we are taking comment on that SIP interpretation as part of this reconsideration, the current inclusion of the CAL LEV standards into state SIPs does not make the pollutants covered by those standards "subject to regulation" under the Act since the PSD Interpretive Memo remains in effect for the federal PSD program.

In a related matter concerning the final interpretation of the regulatory language found in 40 CFR 52.21(b)(50)(iv), we are seeking comment on whether the interpretation of "subject to regulation" should also more clearly identify the specific date on which PSD regulatory requirements would apply. In the PSD Interpretative Memo, the Administrator stated that EPA interprets language in the definition of "regulated NSR pollutant" to mean that the fourth part of the definition should "apply to a pollutant upon promulgation of a regulation that requires actual control of emissions." Memo at 14. However, after evaluating the underlying statutory requirement in the CAA and the language in all parts of the regulatory definition more closely, EPA proposes to modify its interpretation of the fourth part of the definition with respect to the timing of PSD applicability.

In considering the actual application of PSD requirements to regulated NSR pollutants that are "subject to regulation," we believe that the term "subject to regulation" in the statute and regulation is most naturally interpreted to mean that PSD requirements apply when the regulations addressing a particular pollutant become final and effective. The CAA requires PSD controls "for each pollutant subject to regulation" under the Act that are emitted from a source and does not mention promulgation. See 42 U.S.C. 7475(a)(4) and 7479(3) (emphasis added). The regulatory language of 40 CFR 52.21(b)(50)(iv) does not specify

the exact time at which the PSD requirements should apply to pollutants in that class, whether upon promulgation or effective date of the underlying regulation. However, the use of "subject to" in the Act suggests that PSD requirements are intended to be triggered when those standards become effective for the pollutant. No party is required to comply with a regulation until it has become final and effective. Prior to that date, an activity covered by a rule is not in the ordinary sense "subject to" any regulation. Regardless of whether one interprets regulation to mean monitoring or actual control of emissions, prior to the effective date of a rule there is no regulatory requirement to monitor or control emissions.

Reading "subject to regulation" to apply at the effective date is also appropriate in light of the requirements of the Congressional Review Act (CRA). Under the CRA, major regulations promulgated by EPA do not become effective until after Congress has had an opportunity to review them. See 5 U.S.C. 801 et seq. As part of that review, Congress can potentially disapprove final actions issued by federal agencies within a specified time period. Accordingly, under the CRA, a major rule cannot take effect until 60 days after it is published in the Federal Register. Since an EPA regulation that would trigger PSD requirements for a pollutant could be disapproved after it is promulgated, it makes sense that PSD requirements should not

apply to pollutants until the underlying regulation is final and effective, and not simply promulgated.

Since the fourth part of the definition of "regulated NSR pollutant" (40 CFR 52.21(b)(50)(iv)), does not use the word promulgated and uses the "subject to regulation" language from the CAA, the language in the fourth part of the definition can be interpreted to render PSD requirements applicable to a pollutant upon the effective date of a regulation. Because this is consistent with a more natural reading of the statutory language in the Clean Air Act, the application of the Congressional Review Act to EPA regulations, and the "actual control interpretation" favored by EPA at this time, we propose upon reconsideration to interpret section 40 CFR 52.21(b)(50)(iv) to make PSD requirements applicable to a pollutant upon the effective date of a regulation covered by this part of the definition.

The PSD Interpretive Memo relied on other parts of the definition of "regulated NSR pollutant" to conclude that PSD requirements apply to a pollutant upon promulgation of a control requirement. However, a closer reading of the other parts of that definition indicates that the language used in several parts of the definition may in fact be construed to make PSD applicable upon the effective date of regulatory requirements, rather than the date of promulgation. The definition says that PSD requirements apply to NSPS or Title VI pollutants once they are

"subject to a[ny] standard promulgated under" particular provisions of the CAA. 40 CFR 52.21(b)(50)(ii)-(iii). While the word "promulgated" appears in the definition, this term qualifies the underlying standard and does not directly address the actual application of PSD requirements. Under the language in these two parts of the definition, PSD requirements apply when a pollutant becomes "subject to" the underlying standard, which is "promulgated under" a particular part of the Act. For the same reasons as discussed above, we think it is best to interpret these two provisions to apply PSD requirements to NSPS and Title VI pollutants on the effective date of the underlying standards.

However, different timing language is used for the first class of pollutants described in the regulated NSR pollutant definition: PSD requirements apply once a "standard has been promulgated" for a NAAQS pollutant or its precursors. 40 CFR 52.21(b)(50)(i). The use of "has been" in the regulation indicates that a pollutant becomes a "regulated NSR pollutant," and hence PSD requirements for the pollutant are triggered, on the date a NAAQS is promulgated. Thus, it may not be possible for EPA to read the regulatory language in this provision to make PSD applicable to a NAAQS pollutant upon the effective date of the NAAQS. Although our present view is that the Clean Air Act is most naturally read to make PSD requirements applicable upon the effective date of a rule that "regulates" the pollutant, we

are not at this time proposing to modify the language in section 40 CFR 52.21(b)(50)(i). Since EPA is not presently proposing to establish a NAAQS for any additional pollutants, the timing of PSD applicability for a newly identified NAAQS pollutant does not appear to be of concern at this time. If EPA adopts the interpretation proposed here with respect to the timing of PSD applicability, we will consider whether a revision of this regulatory language is needed at such time as EPA may be considering promulgation of a NAAQS for an additional pollutant.

Accordingly, in considering statutory language and the actual application of PSD requirements in practice, we believe the "subject to regulation" language in the fourth part of the regulated NSR pollutant definition should be interpreted such that PSD requirements would not apply to pollutants covered by this part of the definition until the effective date of the underlying regulation. EPA believes the underlying statutory requirements and the structure of the regulation support this position. EPA requests comment on our interpretation that a pollutant becomes "subject to regulation" under section 52.21(b)(50)(iv) upon the effective date of the underlying regulation, as well as any other legal or policy factors that that could inform this interpretation.

H. Other Issues

As a general matter, during the public comment period for other GHG rulemaking actions, such as the GHG Mandatory Reporting Rule (74 FR 16447, April 10, 2009) and the proposed Endangerment Finding (74 FR 18885, April 24, 2009), EPA received some comments that discussed the interpretation of the PSD applicability issues we are reconsidering here. The notices of proposed rulemaking for those packages clearly indicated that the issue of how and when PSD permitting requirements would apply to GHG pollutants would be addressed during this reconsideration action (74 FR at 16456, n. 8 and 18905, n. 29), and EPA will not be searching other rulemaking dockets for comments that might be applicable to our current reconsideration of the PSD Interpretive Memo. Accordingly, we direct all parties that might have submitted comments regarding interpretation of the PSD applicability definitions in those other rulemakings to submit new comments in accordance with the requests in this reconsideration process. In particular, commenters should submit only those portions of their previously submitted comments that respond to the specific requests for comment in this action.

We believe the above summary of the PSD Interpretive Memo, the summary of Petitioners' arguments for reconsideration of the Memo, and the requests for comments presented thus far provide an adequate basis for the public to comment on the Agency's reconsideration of the PSD Interpretive Memo. However, in

accordance with Administrator Jackson's February 17, 2009 grant of reconsideration, EPA also seeks comment on any other interpretations of "subject to regulation" and any other issues that were not addressed in the PSD Interpretive Memo but may help to inform our present reconsideration of that Memo, including those raised by the EAB's Deseret decision.

For example, there is an issue from the Deseret case that is relevant to our consideration of the monitoring & reporting interpretation. Briefs submitted by Region VIII and the EPA Office of Air and Radiation (OAR) in that case argued that even if the monitoring & reporting interpretation was adopted by the Board, PSD permitting requirements would not apply to CO_2 emissions. Region VIII and OAR reasoned that the existing CO_2 monitoring and reporting regulations were not promulgated "under the Act" because the text, context, and legislative history of the underlying statutory provision "demonstrate that Congress did not intend section 821 of the 1990 Public Law" amending the CAA to become part of the CAA. Deseret at 55. The EAB found that the statutory text both supported and subverted this argument, and also that the Agency's prior actions and statements were inconsistent with and contradictory to it. Accordingly, the Board declined to rely on this argument in deciding the case and directed Region VIII to consider the issue more fully on remand. Should the EPA adopt the monitoring and reporting interpretation,

it will be necessary for EPA to resolve whether or not the existing CO_2 monitoring and reporting regulations were promulgated "under the Act" since the position taken by Region VIII and OAR in the Deseret case would keep us from applying that interpretation in some instances. We therefore welcome comments on this issue. We note that there are several factors that make us less inclined to maintain the position advocated by Region VIII and OAR in the Deseret case on remand. Notably, the EAB found that EPA's previous statements on whether section 821 was part of the Clean Air Act had been inconsistent and that EPA had taken actions that were contradictory to the position advocated by Region VIII and OAR. Although we are considering changing our position, we want our review of this issue to be informed by public comments. Accordingly, consistent with our grant of reconsideration, we seek comment on the section 821 issue and any other issues or interpretations to the extent they could inform our final interpretation of the regulatory phrase "subject to regulation."

In addition, this reconsideration of the PSD Interpretive Memo is following the type of notice and comment process normally found in formal rulemaking proceedings. See CAA section 307(d). Accordingly, EPA is also seeking comment on whether or not, upon completion of this reconsideration, the Agency should codify the final interpretation of what makes a pollutant "subject to

regulation" for the purposes of PSD applicability into the definitions section of the federal PSD regulations. 40 CFR 52.21(b). If a commenter supports EPA codifying its "subject to regulation" PSD applicability position, we request that the commenter include in their comment suggested amendatory language for inclusion in 40 CFR 52.21.

As we are requesting comment on whether to codify the Agency's final interpretation in the federal PSD rules found at 40 CFR 52.21, we also request comment on whether that interpretation should be also codified in 40 CFR 51.166 for permitting authorities with approved implementation plans. We note that the PSD Interpretive Memo expressly limits the applicability of the interpretation to permitting jurisdictions that fall under the federal PSD program. Since the EAB determined that the interpretation adopted in this memorandum was not previously established by the Agency, that interpretation should not apply retroactively to prior approvals of SIPs by EPA Regional Offices. However, the Memo gives discretion to EPA Regional Office authorities to apply the Memo's interpretation prospectively when reviewing and approving new submissions for approval or revision of state plans under 40 CFR 51.166. The Memo also explains that when states use the same language in their approved implementation plans as contained in 40 CFR 52.21(b)(50), those states may interpret that language in their

state regulations in the same manner as reflected in the Memo. See Memo at 3, n. 1. For the sake of consistent application of EPA's final interpretation, we are soliciting comment on whether we should also codify the Agency's final interpretation as a revision to 40 CFR 51.166.

Finally, we note that, in addition to the policy questions raised by each of the interpretations above, there is another overarching consideration upon which we seek comment: the consequence that a given interpretation would have on the scope and timing of the triggering of the PSD program for GHGs. Although the policy questions discussed earlier extend beyond the immediate issues surrounding triggering of PSD for GHGs, we also seek comment on whether these immediate issues, discussed below, warrant consideration in this reconsideration effort.

The actual control interpretation would mean that GHGs become "subject to regulation" upon final promulgation of the GHG Light Duty Vehicle Rule recently proposed by EPA. **[CITE, or "also published in the Proposed Rules section of this Federal Register"]** We are concerned about millions of small and previously unpermitted sources becoming immediately subject to PSD permitting as a result of finalization of that rule. The basis for this concern, and EPA's approach to addressing it, are explained in a separate proposal known as the GHG Tailoring Rule.

[CITE, or "also published in the Proposed Rules section of this Federal Register"] The GHG Tailoring Rule proposes to establish temporary applicability thresholds for PSD and Title V purposes to levels that reflect the administrative capabilities of permitting authorities to address GHG emissions from stationary sources. Without the GHG Tailoring Rule, PSD permitting requirements would apply to numerous small sources, resulting in a program that is impossible to administer due to a tremendous influx of permit applications accompanied by, at least initially, a shortfall of resources, training, and experience by permitting authorities, the regulated community, and other stakeholders.

The GHG Tailoring Rule is intended to address this problem in advance of regulation under the GHG Light Duty Vehicle Rule. Therefore, under our preferred interpretation of "subject to regulation", EPA will not face the administrative impossibility problem if the GHG Tailoring Rule is finalized according to this planned timing. However, if EPA adopts any other interpretation (which thereby would void the PSD Interpretive Memo), additional timing considerations arise. Finalizing any other interpretation prior to promulgating the GHG Light Duty Vehicle Rule and Tailoring Rule would result in earlier triggering of PSD permitting requirements for future new and modified sources of GHGs including the large numbers of small sources addressed by the Tailoring Rule. On the other hand, finalizing any other

interpretation after EPA promulgates the GHG Light Duty Vehicle Rule and Tailoring Rule would likely have a limited effect on triggering PSD permitting requirements for future new and modified sources of GHGs, because we expect that the GHG Light Duty Vehicle Rule would already have triggered PSD for the same pollutants and the Tailoring Rule would be in place. Our strong preference is that these three GHG actions -- the Light Duty Vehicle Rule, the Tailoring Rule, and this reconsideration -- work together with EPA's other GHG-related actions to yield a common sense and efficient approach to GHG regulation that does not result in the imposition of an impossible administrative burden on permitting agencies. Our preferred approach has the added benefit of achieving this goal by triggering PSD only after a Tailoring Rule can be put in place. We seek comment on whether and how this goal could be achieved were EPA to adopt any of the other four interpretations.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866 - Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." The action was identified as a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response

to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. We are not promulgating any new paperwork requirements (e.g., monitoring, reporting, and recordkeeping) as part of this proposed action. The OMB has previously approved the information collection requirements contained in the existing NSR regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and has assigned OMB control number 2060-0003, EPA ICR number 1230.17. A copy of the OMB approved Information Collection Request may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Avenue, NW., Washington, DC 20460 or by calling (202) 566-1672.

C. Regulatory Flexibility Act

This proposed reconsideration of the PSD Interpretive Memo is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any

other statute. In the case of this reconsideration process, public notice and comment was not required under the APA or CAA, but rather was voluntarily conducted in accordance with the February 17, 2009 letter granting reconsideration. Accordingly, an RFA analysis is not required.

However, EPA recognizes that some small entities continue to be concerned about the potential impacts of the statutory imposition of PSD requirements that may occur given the various EPA rulemakings currently under consideration concerning greenhouse gas emissions. As explained in the preamble for the proposed PSD Tailoring Rule **[CITE, or "... also published within the same Federal Register"]**, EPA is using the discretion afforded to it under section 609(c) of the RFA to consult with OMB and SBA, with input from outreach to small entities, regarding the potential impacts of PSD regulatory requirements as that might occur as EPA considers regulations of GHGs. Concerns about the potential impacts of statutorily imposed PSD requirements on small entities will be the subject of deliberations in that consultation and outreach. Concerned small entities should direct any comments relating to potential adverse economic impacts on small entities from PSD requirements for GHG emissions, including any concerns about the impacts of this reconsideration action, to the docket for the PSD tailoring rule.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538, requires federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments that might be significantly or uniquely affected by any regulatory requirements. The plan must enable officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

This proposed reconsideration does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Thus, this proposed rule is not subject to the requirements of sections 202 or 205 of UMRA.

In developing this reconsideration notice, EPA consulted with small governments pursuant to a plan established under section 203 of UMRA to address impacts of regulatory requirements in the rule that might significantly or uniquely affect small governments.

E. Executive Order 13132 - Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action would ultimately simplify and reduce the burden on state and local agencies associated with implementing the PSD program by providing clarity on what pollutants are "subject to regulation" to the CAA for PSD applicability purposes. Therefore, this proposed rule will not impose substantial direct compliance costs on state or local governments, nor will it preempt state law. Thus, the requirements of sections 6(b) and 6(c) of the Executive Order do not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

F. Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

Subject to the Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs,

and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments nor preempt tribal law. There are no tribal authorities currently issuing major NSR permits; however, this may change in the future.

Although Executive Order 13175 does not apply to this proposed rule, EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045 - Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because this proposed reconsideration merely proposes to reconsider EPA's previous PSD applicability with regards to what constitutes a pollutant being

"subject to regulation" under the CAA for the purposes of PSD applicability.

H. Executive Order 13211 - Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action proposes options and positions that would clarify PSD applicability for pollutants "subject to regulation" under the CAA and does not, in and of itself, pose any new requirements.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide

Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed reconsideration does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the U.S.

EPA has determined that this proposed reconsideration of PSD applicability will not have a disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This proposed reconsideration merely proposes to reconsider EPA's previous PSD applicability with regards to what constitutes a pollutant being

"subject to regulation" under the CAA for the purposes of PSD applicability.

Page 75 of 75 - Prevention of Significant Deterioration (PSD): Interpretation of "Subject to Regulation" for Pollutants Covered Under Federal PSD

V. Statutory Authority

The statutory authority for this action is provided by sections 101, 107, 110, and 301 of the CAA as amended (42 U.S.C. 7401, 7410, and 7601).

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

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Dated:

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Lisa P. Jackson,
Administrator.